

**Applicant Details**

First Name	<b>Katie</b>
Last Name	<b>Bruck</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:kbruck@jd20.law.harvard.edu">kbruck@jd20.law.harvard.edu</a>
Address	<div> <div>Address</div> <div> <div>Street</div> <div>900 Massachusetts Ave., #4</div> <div>City</div> <div>Cambridge</div> <div>State/Territory</div> <div>Massachusetts</div> <div>Zip</div> <div>02139</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	<b>8184976475</b>

**Applicant Education**

BA/BS From	<b>University of California-Los Angeles</b>
Date of BA/BS	<b>December 2015</b>
JD/LLB From	<b>Harvard Law School</b>
	<a href="https://hls.harvard.edu/dept/ocs/">https://hls.harvard.edu/dept/ocs/</a>
Date of JD/LLB	<b>May 28, 2020</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Civil Rights-Civil Liberties Law Review</b>
Moot Court Experience	<b>No</b>

**Bar Admission**

Admission(s)	<b>California</b>
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**Prior Judicial Experience**

Judicial Internships/ Externships	<b>No</b>
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Post-graduate Judicial Law Clerk      **Yes**

### **Specialized Work Experience**

### **Recommenders**

Lee, Thomas  
leet@lawgate.byu.edu  
801-238-7950

Minow, Martha  
minow@law.harvard.edu  
617-495-4276

Agüero, Destini  
daguero@law.harvard.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

April 22, 2022

The Honorable John Copenhaver, Jr.  
Robert C. Byrd United States Courthouse  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

Dear Judge Copenhaver:

I am writing to express my interest in applying for a clerkship in your chambers for Fall 2022. Since graduating from Harvard Law School in 2020, I have been working as an Equal Justice Works Fellow at the Legal Services Center in Boston, Massachusetts. I would be available to begin a clerkship in October 2022, when my fellowship ends.

Attached please find my resume, transcript, and writing sample. You will be receiving separately letters of recommendation from the following individuals:

Prof. Martha Minow  
Harvard Law School  
minow@law.harvard.edu  
(617) 495-4276

Justice Thomas Lee  
Utah Supreme Court  
thomasrexlee@gmail.com  
(801) 238-7950

Destini Agüero  
Legal Services Center  
daguero@law.harvard.edu  
(617) 390-2530

In my current position, I provide legal representation to low-income veterans with disabilities in complex estate planning matters and litigation before the Social Security Administration. This experience has allowed me to further develop my legal research and writing skills. During law school, I served as an editor of the *Harvard Civil Rights-Civil Liberties Law Review*, where I was responsible for editing articles for publication.

I am happy to provide any other information that would be helpful to you. Thank you for your time and consideration.

Sincerely,  
Katie Bruck

**KATIE BRUCK**

900 Massachusetts Ave. #4 • Cambridge, MA 02139 • (818) 497-6475 • kbruck@jd20.law.harvard.edu

**EDUCATION****HARVARD LAW SCHOOL, J.D., May 2020**

Honors: Dean's Scholar Prize in Legal Research and Writing, Fall 2017

Activities: *Civil Rights-Civil Liberties Law Review*, Editor; HLS Student Government, Public Interest Chair; Asian Pacific American Law Students Association, Member**UNIVERSITY OF CALIFORNIA, LOS ANGELES, B.A. in History, Dec. 2015, *summa cum laude*****EXPERIENCE****LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL**

Boston, MA

*Equal Justice Works Fellow / Staff Attorney – Veterans Law and Disability Benefits Clinic*

Oct 2020 – present

Represent low-income veterans with disabilities. Draft estate planning documents and litigate disability benefits (SSI/SSDI) matters before the Social Security Administration. Develop new community partnerships and provide community education through workshops and clinics. Create advocacy guide on intersection of estate planning and public benefits.

**CENTER FOR HEALTH LAW AND POLICY INNOVATION**

Cambridge, MA

*Student Attorney*

Spring 2020

Researched and wrote on health policy issues, including federal Medicare regulations and state pandemic responses.

**LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL**

Boston, MA

*Student Attorney – Domestic Violence & Family Law Clinic*

Fall 2019

Provided direct representation to survivors of domestic violence in divorce and child support cases.

*Student Attorney – Veterans Law and Disability Benefits Clinic*

May – June 2019

Created impact litigation strategy for LGBT veterans and drafted VA benefits appeal brief for veteran with PTSD.

**PUBLIC COUNSEL**

Los Angeles, CA

*Law Clerk – Opportunity Under Law Project*

July – Aug 2019

Completed work to support impact litigation, including drafting amicus brief and performing legal and factual research.

**MASSACHUSETTS ADVOCATES FOR CHILDREN**

Boston, MA

*Clinical Extern*

Fall 2018

Created strategies for administrative and policy advocacy focused on special education.

**DISABILITY LAW CENTER**

Boston, MA

*Law Fellow*

Summer 2018

Performed research and writing to support advocacy, including memo to federal agency concerning Medicaid coverage of services for individuals with ID/DD. Participated in site-monitoring visits at community programs and mental hospitals.

**PRISON LEGAL ASSISTANCE PROJECT**

Cambridge, MA

*Student Attorney*

Fall 2017 – Summer 2019

Represented incarcerated clients in administrative disciplinary hearings and parole hearings.

**SEONG GOK MIDDLE SCHOOL**

Daegu, South Korea

*Native English Teacher*

2016 – 2017

Created teaching materials and executed creative lesson plans incorporating assigned curricula for over 600 students.

**L.A. ELDER LAW**

Los Angeles, CA

*Law Clerk*

2014 – 2016

Drafted estate planning documents and pleadings for civil and probate cases. Maintained calendar and conducted intake.

**JAZZ HANDS FOR AUTISM**

Los Angeles, CA

*Executive Board Member*

2014 – 2016, 2021 – present

Co-founded non-profit organization that provides music education and career opportunities for young adults with autism.

**LOS ANGELES SUPERIOR COURT – SELF-HELP CENTER**

Los Angeles, CA

*JusticeCorps Member*

2013 – 2015

Led workshops and worked with hundreds of *pro se* family law litigants to provide equal access to the court system.**Bar Admissions:** California; Massachusetts Rule 3:04 Limited Practice through February 2024**Interests:** Hiking with my rescue dog, traveling through Asia, classical piano, nail art, travel scrapbooking

Harvard Law School

Date of Issue: October 1, 2021  
Not valid unless signed and sealed  
Page 1 / 2

Record of: Katherine H Bruck  
Current Program Status: Graduated  
Degree Received: Juris Doctor May 28, 2020  
Pro Bono Requirement Complete

JD Program				2063	Education Advocacy and Systemic Change	H	2
Fall 2017 Term: August 30 - December 19				8009	Cole, Susan		
1000	Civil Procedure 1	P	4	8009	Education Law Clinic: Externships	H	4
	Grove, Tara				Cole, Susan		
				Fall 2018 Total Credits:			12
1001	Contracts 1	P	4	Winter 2019 Term: January 07 - January 25			
	Frug, Gerald			2079	Evidence	P	2
1002	Criminal Law 1	P	4		Murray, Peter		
	Sullivan, Ronald			Winter 2019 Total Credits:			2
1006	First Year Legal Research and Writing 1B	H	2	Spring 2019 Term: January 28 - May 17			
	Samuel, Ian			2651	Civil Rights Litigation	P	3
	* Dean's Scholar Prize				Michelman, Scott		
1004	Property 1	P	4	2086	Federal Courts and the Federal System	H	5
	Singer, Joseph				Field, Martha		
Fall 2017 Total Credits: 18				2098	Gender Violence, Law and Social Justice	P	3
Winter 2018 Term: January 02 - January 19					Rosenfeld, Diane		
1007	Problem Solving Workshop F	CR	2	Spring 2019 Total Credits:			11
	Rakoff, Todd			Total 2018-2019 Credits:			25
Winter 2018 Total Credits: 2				Fall 2019 Term: August 27 - December 18			
Spring 2018 Term: January 22 - May 11				2000	Administrative Law	P	4
2011	Art of Social Change	H	2		Stephenson, Matthew		
	Bartholet, Elizabeth			2050	Criminal Procedure: Investigations	P	4
1006	First Year Legal Research and Writing 1B	H	2		Simonson, Jocelyn		
	Samuel, Ian			8032	Litigating in the Family Courts: Domestic Violence and Family Law Clinic	H	4
1003	Legislation and Regulation 1	H	4		Odim, Nnena		
	Renan, Daphna			2085	Litigating in the Family Courts: Domestic Violence and Family Law Clinical Seminar	H	2
1008	Public International Law	P	4		Odim, Nnena		
	Modirzadeh, Naz			Fall 2019 Total Credits:			14
1005	Torts 1	P	4	Winter 2020 Term: January 06 - January 24			
	Goldberg, John			2249	Trial Advocacy Workshop	CR	3
Spring 2018 Total Credits: 16					Sullivan, Ronald		
Total 2017-2018 Credits: 36				Winter 2020 Total Credits:			3
Fall 2018 Term: August 29 - December 20							
2383	Advanced Interpretation: Law and Language	H	2				
	Lee, Thomas						
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment	P	4				
	Minow, Martha						

continued on next page

  
Assistant Dean and Registrar

Harvard Law School

Record of: Katherine H Bruck

Date of Issue: October 1, 2021  
 Not valid unless signed and sealed  
 Page 2 / 2

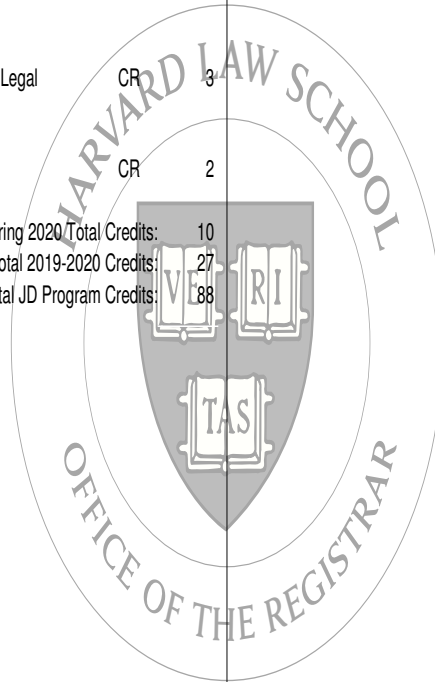
Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

8033	Health Law and Policy Clinic of the Center for Health Law and Policy Innovation Greenwald, Robert	CR	5
2169	Legal Profession - The New Market for Personal Legal Services: Ethical and Professional Challenges Charn, Jeanne	CR	3
2497	Public Health Law and Policy Greenwald, Robert	CR	2

Spring 2020 Total Credits: 10  
 Total 2019-2020 Credits: 27  
 Total JD Program Credits: 88

End of official record



*Katie Bruck*  
 Assistant Dean and Registrar

**HARVARD LAW SCHOOL**  
 Office of the Registrar  
 1585 Massachusetts Avenue  
 Cambridge, Massachusetts 02138  
 (617) 495-4612  
[www.law.harvard.edu](http://www.law.harvard.edu)  
[registrar@law.harvard.edu](mailto:registrar@law.harvard.edu)

Transcript questions should be referred to the Registrar.

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**In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.**  
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A student is in good academic standing unless otherwise indicated.

#### **Accreditation**

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

#### **Degrees Offered**

J.D. (Juris Doctor)  
 LL.M. (Master of Laws)  
 S.J.D. (Doctor of Juridical Science)

#### **Current Grading System**

**Fall 2008 – Present:** Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

**Dean's Scholar Prize (\*):** Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

#### **Rules for Determining Honors for the JD Program**

*Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.*

#### **May 2011 - Present**

<i>Summa cum laude</i>	To a student who achieves a prescribed average as described in the <u>Handbook of Academic Policies</u> or to the top student in the class
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipient(s)
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

#### **Prior Grading Systems**

**Prior to 1969:** 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67 (B-), 60-64 (C), 55-59 (D), below 55 (F)

**1969 to Spring 2009:** A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

#### **Prior Ranking System and Rules for Determining Honors for the JD Program**

*Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.*

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

<b>1969 to June 1998</b>	<b>General Average</b>
<i>Summa cum laude</i>	7.20 and above
<i>Magna cum laude</i>	5.80 to 7.199
<i>Cum laude</i>	4.85 to 5.799

#### **June 1999 to May 2010**

<i>Summa cum laude</i>	General Average of 7.20 and above (exception: <i>summa cum laude</i> for Class of 2010 awarded to top 1% of class)
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipients
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

#### **Prior Degrees and Certificates**

LL.B. (Bachelor of Laws) awarded prior to 1969.

The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

  
 Assistant Dean and Registrar



Chambers of  
Associate Chief Justice  
Thomas R. Lee

## Supreme Court of the State of Utah

Matheson Courthouse  
450 South State Street, Fifth Floor  
PO Box 140210  
Salt Lake City, Utah 84114-0210  
Telephone: (801) 238-7935  
Email: [lee chambers@utcourts.gov](mailto:lee chambers@utcourts.gov)

April 13, 2022

### Recommendation of Katherine Brunk

To Whom It May Concern:

I am writing to recommend Katie Bruck as a law clerk. Katie is a 3L at Harvard Law School. She is a brilliant person with top-notch writing skills and a deep commitment to social justice. Her resume highlights the latter—with her work at the Disability Law Center and Public Counsel during the summers after her 1L and 2L years, and her involvement with Massachusetts Advocates for Children last fall. She is also a founding board member of Jazz Hands for Autism. Her resume and transcript also give some indication of her academic distinction and analytical ability. It shows that she has earned increasing numbers of Honors designations at Harvard and earned the Dean's Scholar Prize in her first-year legal research and writing course.

But I want to speak to something that you cannot see from Katie's resume and transcript. I had the privilege of getting to know Katie as a student in a seminar that I taught at Harvard last fall on Advanced Interpretation. This seminar exposes students to some theories and tools from the field of linguistics that are being applied to the field of legal interpretation. I introduce the students to these theories and tools and then invite them to explore their viability as applied to constitutional law, statutes, and contracts. Several of the students in the seminar had backgrounds in linguistics and related fields. Katie did not. But she clearly stood out as one of the top students in the seminar, easily earning an Honors grade.

Soon in the semester I learned that Katie was one that I could count on to contribute novel thoughts and ideas that would help to bring our class discussion to a higher level. Katie was more than just well-prepared for class.

She was a star of the class discussion. She never dominated the discussion but she consistently made important contributions. This was particularly impressive to me given that Katie did not have the same expertise as some of her classmates. It became clear that Katie is a quick learner and a careful thinker.

Katie's written work-product was equally as impressive. I asked the students to write a reaction paper on a constitutional and a statutory problem. And Katie's writing was at or near the top of a very impressive group of students. Katie clearly knows how to structure an argument and string together cohesive sentences and paragraphs. But she also has big ideas. As with the class discussion, Katie's writing showed a depth of thought that few others in the class brought to bear.

For these reasons I feel confident that Katie will be an excellent law clerk. I hope you will invite her for an interview. I am confident that you will be glad you did.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas R. Lee', with a stylized, cursive script.

Thomas R. Lee

April 22, 2022

The Honorable John Copenhaver, Jr.  
Robert C. Byrd United States Courthouse  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

Dear Judge Copenhaver:

It is a pleasure to write in support of Katie Bruck's application to serve as your law clerk. She is a strong writer; she takes initiative; she juggles commitments to classwork, journal work, clinical work, and student organizations with apparent ease; and she is driven by a passion to use law to assist persons with disabilities.

In my 100-person Constitutional Law class, she wrote a good exam and especially excelled during an in-class moot court. Assigned to a case involving a challenge to restrictions on abortion access, Katie responded with expertise to questions in class. Her written summary of arguments submitted before that class were cogent, and her written reflection following the class thoughtfully examined the problems with the governing doctrinal framework, the fact-intensive review, and the ambiguous status of government motives.

Katie is highly professional, mature, and adaptable. She has extensive experiences in legal and justice work: she has assisted pro se family court litigants, drafted estate-planning pleadings and materials, conducted intake interviews with prospective clients, produced research memoranda on financial and social services available under statutes and regulations, represented prisoners in administrative matters, and handled appeals for veterans. Her strong commitment to public service informs her work with several student organizations, including the public interest network she founded and leads. She taught school in South Korea, and she helped to found a non-profit organization offering opportunities in music for young adults with autism.

Katie is working on an independent research project under my supervision that will advance arguments for improving the educational experiences for students with disabilities. Her brother, who has a developmental disability, inspires much of her work, but her tenacity, hard work, and accomplishments are her own.

I am confident that Katie's appetite for hard work, her demonstrated ability to produce legal research and writing under tight deadlines, and her commitment to justice will be real assets as a law clerk. I recommend her highly!

Sincerely,

Martha Minow  
300th Anniversary University Professor, Harvard University

Martha Minow - minow@law.harvard.edu - 617-495-4276

April 22, 2022

The Honorable John Copenhaver, Jr.  
Robert C. Byrd United States Courthouse  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

Dear Judge Copenhaver:

I am writing to recommend Katie Bruck for a Judicial Clerk position with your court. I have had the pleasure of supervising Ms. Bruck since October 2020, when she joined the Veterans Law and Disability Benefits Clinic (VLDBC) at the Legal Services Center of Harvard Law School as a post-graduate, Equal Justice Works Fellow. Her commitment to serving marginalized communities made her an ideal candidate, and throughout her time with the VLDBC, she has proven to be an empathetic advocate devoted to helping her clients navigate complex legal systems and agencies. I can wholeheartedly say her perspective and experience would make an excellent addition to any court.

As Director of the Estate Planning Project of the VLDBC, I work closely with other clinicians at the Legal Services Center, including the Director of the Safety Net Project. We discovered that our combined efforts could assist clients in significant ways. Through the use of benefits-conscious estate planning, disabled clients and those living in poverty could retain their eligibility for public benefits while setting up advance crisis planning. This type of work was crucial, but there was no formal process in place for clients who required both services. When Ms. Bruck first expressed an interest in continuing to serve VLDBC clients after graduation, her prior work with veterans, estate planning for older people, and trauma survivors made her an excellent fit. Upon being awarded the Equal Justice Works Fellowship, Ms. Bruck began the formidable task of becoming an expert in two polarizing areas of law, and all of their tangential areas. She is the only member of the Legal Services Center who is fluent in federal agency regulations like the Social Security Administration, state Medicaid regulations, the Massachusetts Uniform Probate Code, the Massachusetts Uniform Trust Code, and the ethical rules and considerations when representing clients with diminished capacity. Her ability to navigate multiple systems at once to provide the best advocacy for her clients is demonstrative of her abilities to thoroughly research and analyze any legal questions with which she may be faced.

Her work as an Equal Justice Works Fellow with the VLDBC also requires her to utilize vastly different legal skills. She is responsible for drafting complete estate plans that include Trusts, Wills, Powers of Attorney, Health Care Proxies and other medical directives, yet she also regularly drafts briefs and other pleadings when filing and litigating agency appeals with the Social Security Administration. Preparation for these briefs involves hours of client interviewing as well as carefully analyzing thousands of pages of medical and mental health records, applicable caselaw, Social Security advisory opinions, and regulations. Ms. Bruck's briefs ultimately offer the Social Security Administration's administrative law judges a complete and accurate recitation of her findings and a thorough understanding of how the law applies to the facts of the case.

Not only is Ms. Bruck a skilled and efficient legal writer, one of her specialties is her ability to connect with the public. She is able to neutralize a challenging situation when a client is in active crisis by creating a space where her clients feel safe and heard. She is able to communicate complex legal concepts to her clients in a way that allows them to participate in their advocacy. Her ability to foster this type of understanding and connection to the law is not limited to her work with her clients. Ms. Bruck regularly presents on benefits-conscious estate planning for both local and national organizations and their audiences. She understands that the law can be daunting for many members of the public, and she has the natural ability to meaningfully communicate the law to fit her audience. While I recognize many parties before your court may have legal representation, and require Ms. Bruck to analyze and decipher the law in its most complex form, it is those appearing pro se that will benefit from Ms. Bruck's community education experience.

While Ms. Bruck is an accomplished lawyer with significant experience in multiple areas of law, I would be remiss if I did not mention her contributions to the work environment. While she brings a welcome sense of humor to the work she does, she always displays a commitment to professionalism when speaking about her clients and other interested parties. Having been present for a number of her client meetings, I saw the challenges she experienced first-hand, yet she never wavered in offering her clients the utmost respect both when they were present and crucially, when they were not. When relaying a challenging conversation or interaction Ms. Bruck takes care not to personalize the interaction, instead choosing to discuss the relevant substantive facts and carefully describing the tone only to set the stage for and welcome feedback from her colleagues. Having practiced in various counties in the Commonwealth, I can state that the professionalism, maturity, and grace Ms. Bruck brings to her work environment are the traits I have grown so fond of when interacting with other members of the Bar, and I believe they would be welcome in any court.

I consider it an honor to recommend Ms. Bruck for a Judicial Clerk position. I am truly grateful for the opportunity I have had to get to know her as her supervisor, and I know she will elevate any court with which she becomes a member.

Sincerely,

Destini M. Agüero, Esq.  
Clinical Instructor and Estate Planning Project Director

Destini Agero - daguero@law.harvard.edu

Veterans Legal Clinic, Legal Services Center of Harvard Law School  
122 Boylston Street  
Jamaica Plain, MA 02130  
Phone: (617) 390-2530  
Fax: (617) 522-0715  
Pronouns: She, Her, Hers

Destini Agero - [daguero@law.harvard.edu](mailto:daguero@law.harvard.edu)

**KATIE BRUCK**

900 Massachusetts Ave. # • Cambridge, MA 02139 • (818) 497-6475 • kbruck@jd20.law.harvard.edu

**WRITING SAMPLE #1: Civil Rights Litigation Memo**

Drafted Summer 2019

This memo is used with permission from the Legal Services Center.  
All names and identifying details have been changed to protect confidentiality.  
This memo was not edited by a supervisor.

### QUESTION PRESENTED

Jane Smith was discharged from the Navy in 2009 under the Don't Ask, Don't Tell policy ("DADT"). She has received every form of relief specified in the DADT Repeal Memo.

Can Ms. Smith receive further relief for her discharge?<sup>1</sup>

### BRIEF ANSWER

Ms. Smith is not entitled to any statutory relief, but can bring a substantive due process claim using the Ninth Circuit's Witt standard, as well as a weaker equal protection claim. These claims should be brought in the D.C. Circuit after exhausting administrative remedies at the Board for Correction of Naval Records (BCNR).

### FACTS

In 2007, Jane Smith, a Maine resident, entered active duty service in the U.S. Navy as a Seaman Apprentice. Throughout her service on the USS Coronado, Ms. Smith's chain of command gave her positive evaluations. Captain Chang, one of Ms. Smith's superior officers, stated that Ms. Smith had a solid record of good behavior and hard work, and that he was "confident in her contributions to our mission." Chief Garcia, another superior officer, stated that Ms. Smith was "a great worker with a great attitude."

Chief Garcia believes that, despite her exemplary service, Ms. Smith faced discrimination based on her sexual orientation. The Master Chief, the second-in-command officer, opposed lesbian, gay, and bisexual ("LGB") individuals serving in the military, which Chief Garcia believes affected the culture onboard the ship. One year into her service, contrary to typical practice, Ms. Smith had not received any specialized training and was only assigned cleaning duties. Chief

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<sup>1</sup> Note that this memo does not address the question of whether Ms. Smith could challenge the contents of the DADT Repeal Memo or the administrative decision-making process under the Repeal Memo (topics that will be addressed in a future memo); rather, this memo only addresses challenges to the discharge itself.

Garcia believes that this treatment was the result of Ms. Smith presenting as a lesbian.

The discriminatory treatment Ms. Smith faced was exacerbated by the presence of a so-called “lesbian gang,” which consisted of female LGB servicemembers who sexually harassed other female servicemembers. The presence of this group likely heightened anti-LGB attitudes among some people on the ship. The sexual harassment became such a problem that the commanding officers initiated an investigation. Chief Garcia claims that during the investigation, the Master Chief and other senior officers expressed that they “hate lesbians.” The commanding officers brought charges against multiple lesbian women pursuant to the investigation.

The officers brought a charge for violation of shipboard living regulations against Ms. Smith at this time, despite her lack of involvement in the sexual harassment. The violation resulted from an incident during which Ms. Smith sat on her bed with her feet in the aisle while another female sailor (with whom she was in a relationship) lay on the bed using a computer. Both Captain Chang and Chief Garcia stressed that this violation was not sexual in any way. During an investigation into the violation, for which Ms. Smith received a Non-Judicial Punishment (NJP), the Master of Arms asked Ms. Smith if she was in a homosexual relationship with another sailor, despite DADT’s requirement that officers not inquire about a servicemember’s sexual orientation. After some back and forth, Ms. Smith admitted to the Master of Arms that she had been in a relationship with a woman but had not engaged in any sexual conduct aboard the ship.

Captain Chang recommended Ms. Smith for administrative separation pursuant to DADT on October 1, 2009. In response, Ms. Smith wrote a statement expressing remorse and requesting an Honorable discharge. In this letter, Ms. Smith stated: “I felt that I made my fellow sailors uncomfortable, which in turn made me uncomfortable as well. I didn’t feel even a change of command would either change the way I was feeling, nor the way my behavior was affecting my

fellow sailors.” Ms. Smith and her partner were the only servicemembers from the USS Coronado discharged under DADT. Notably, two separate pairs of women were caught making sexual contact but were not punished. Ms. Smith was denied an Honorable discharge based on “aggravating circumstances” (the shipboard living violation). She instead received a General (Under Honorable Conditions) discharge with Homosexual Conduct as the narrative reason for separation. Additionally, her rank was lowered from E-3 to E-2.

When asked about Ms. Smith’s discharge, Captain Chang stated that he thought having openly LGB servicemembers on the ship negatively impacted morale. However, he admits that he could have transferred either Ms. Smith or her partner to another command to “break things up.” Chief Garcia believes that Ms. Smith’s discharge was unnecessary, and that she was being used as a scapegoat for the larger sexual harassment issue.

On December 22, 2010, approximately one year after Ms. Smith’s discharge, President Obama signed legislation that led to the repeal of DADT. A Department of Defense memorandum articulated guidelines for upgrading DADT discharges.<sup>2</sup> It provided that veterans discharged on the basis of sexual orientation but without “aggravating circumstances,” such as misconduct, could receive discharge upgrades to fully Honorable and change their narrative reason for separation to “Secretarial Authority.”

Ms. Smith applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade following the repeal. The NDRB can change a veteran’s narrative reason for separation, character of discharge, and reentry code. See Repeal Memo. Finding no aggravating circumstances, the NDRB granted Ms. Smith’s petition to change her narrative reason to Secretarial Authority in

<sup>2</sup> MEMORANDUM FROM CLIFFORD L. STANLEY, UNDER SEC’Y OF DEF., TO SEC’YS OF THE MILITARY DEP’T’S, ON CORRECTION OF MILITARY RECORDS FOLLOWING REPEAL OF SECTION 654 OF TITLE 10, UNITED STATES CODE (Sept. 20, 2011) (hereinafter “Repeal Memo”).

2012, as well as her subsequent petition to upgrade her character of discharge to Honorable in 2018. Ms. Smith has therefore received every form of relief enumerated in the DADT Repeal Memo. Ms. Smith wants to receive further relief with respect to her military records, including re-instating her rank from E-2 to E-3, increasing her time in service to obtain 100% eligibility for G.I. Bill education benefits, and changing her narrative reason for separation from “Secretarial Authority” to something she “doesn’t have to explain.”

## DISCUSSION

My colleague addressed the possibility of seeking further relief from the Board for the Correction of Naval Records (BCNR) in a previous research memo, which concluded that the BCNR is unlikely to grant any relief beyond what is provided for in the Repeal Memo. This memo will first analyze potential statutory claims Ms. Smith could use to challenge her discharge, concluding that there are no viable statutory claims. It will then analyze potential constitutional claims, concluding that Ms. Smith could not bring a procedural due process claim, but could bring an equal protection claim (which is unlikely to succeed) and a substantive due process claim. It will finally address the appropriate venue and cause of action for such claims.<sup>3</sup>

### I. Statutory Claims

#### A. **Ms. Smith is unable to bring claims under Title VII, which bars all suits by uniformed servicemembers.**

A challenge to Ms. Smith’s discharge amounts to a claim of employment discrimination. The only federal statute potentially addressing employment discrimination on the basis of sexual orientation is Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2 (prohibiting employment discrimination on the basis of race, color, religion, sex, and national origin); Zarda v.

<sup>3</sup> This memo will use D.C. Circuit cases throughout as supporting authority. Section II.D, infra, at 13, addresses why the D.C. Circuit is the proper venue at the federal court level.

Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018) (allowing Title VII claim of discrimination based on sexual orientation), cert. granted, 139 S. Ct. 1599 (2019). Title VII's protections extend to federal employees, including civilian employees of military departments. See 42 U.S.C. § 2000e-16(a). However, uniformed servicemembers are entirely barred from bringing employment discrimination claims under Title VII. 29 C.F.R. § 1614.103(d)(1). See also Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 92 n.4 (1983); Veitch v. England, 471 F.3d 124, 128 (D.C. Cir. 2006). Ms. Smith was a uniformed servicemember, not a civilian employee, and therefore may not bring claims under Title VII.

**B. Ms. Smith is unable to bring an FTCA claim because she is outside the statute of limitations.**

The Federal Tort Claims Act (FTCA) allows individuals to bring claims against the United States for tortious conduct. See 28 U.S.C. §§ 1346, 2401(b), 2671–80. The federal district courts and the United States Court of Federal Claims have concurrent original jurisdiction over such suits, id. at § 1346(a), which are adjudicated according to state tort law, Richards v. United States, 369 U.S. 1, 9–12 (1962).

A complaint under the FTCA must be filed “within six years after the right of action first accrues.” 28 U.S.C. § 2401. Ms. Smith’s discharge occurred nine years ago, which places her far outside this statute of limitations. Ms. Smith therefore cannot bring any claims under the FTCA.

**II. Constitutional Claims**

Sections A through C will address the viability of claims based on procedural due process, equal protection, and substantive due process, concluding that a substantive due process argument using the Witt standard provides the most viable claim. Sections D and E will address the proper venue and potential causes of action for Ms. Smith’s constitutional claims.

**A. Ms. Smith cannot bring a procedural due process claim because her discharge neither implicated a liberty interest nor denied her notice and hearing.**

Procedural due process “requires that only the most basic procedural safeguards be observed,” Medina v. California, 505 U.S. 437, 453 (1992), namely “notice and an opportunity to be heard,” Paul v. Davis, 424 U.S. 693, 707 (1976). “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” a liberty interest is implicated, and thus that person is entitled to procedural due process. See Paul v. Davis, 424 U.S. 693, 708 (1976) (citing Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951)). However, “reputation alone, apart from some more tangible interest such as employment, is [n]either ‘liberty’ [n]or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.” Id. at 701. Thus, when governmental action jeopardizes an individual’s reputation in a way that affects his or her employment, that individual is entitled to the procedural due process protections of notice and hearing.<sup>4</sup>

The purpose of notice and hearing in this context is to “provide the person an opportunity to clear his name.” Codd v. Velger, 429 U.S. 624, 627 (1977). However, for the hearing “to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee’s reputation.” Id. Thus, in order for a liberty interest to exist, the employee must in some way dispute the stigmatizing information. See Guerra v. Scruggs, 942 F.2d 270, 278–79 (4th Cir. 1991) (finding no liberty interest in reputation based on discharge related to drug offense because petitioner never denied the charges); Doe v. Garrett, 903 F.2d 1455, 1462–63 (11th Cir. 1990) (rejecting naval officer’s due process claim because stigmatizing reason given for discharge, HIV positive status, was accurate); Rich v.

<sup>4</sup> The due process “hearing” requirement refers to an “opportunity to be heard,” not necessarily an in-person, adversarial hearing. See Paul, 424 at 707; Goss v. Lopez, 419 U.S. 565, 579 (1975).

Secretary of Army, 735 F.2d 1220, 1227 (10th Cir. 1984) (rejecting servicemember's due process claim because he did not deny being homosexual, which was the reason for his discharge); Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974) (rejecting due process claim by Air Force officer because he did not deny criminal charges leading to his discharge).

“Other than Honorable” discharges can be stigmatizing.<sup>5</sup> However, a typical discharge under DADT involved the government accurately alleging that a servicemember was homosexual and/or engaged in homosexual behavior. Unless the military falsely accused a servicemember of being LGB, a DADT discharge would not give rise to a liberty interest. Ms. Smith is, in fact, a lesbian woman; therefore, her discharge did not implicate a liberty interest.

Even if a discharge under DADT did create a liberty interest, the procedures associated with discharges satisfy the due process requirements of notice and hearing. According to naval policies in place at the time of Ms. Smith's discharge, administrative separation for reason of homosexual conduct required that the Administrative Board provide notice of the reason for separation to the servicemember, who then had the opportunity to respond in writing. See MILPERSMAN §§ 1910-148.6, 1910-404.1 (July 25, 2008). These provisions satisfy the notice and hearing requirement. See also Holley v. United States, 124 F.3d 1462, 1469 (Fed. Cir. 1997) (finding due process requirements satisfied by written notice and opportunity to respond prior to servicemember's general discharge under honorable conditions). Ms. Smith did, in fact, receive both notice and an opportunity to be heard under these procedures. Therefore, her discharge would not have violated any potential right to procedural due process. Ms. Smith therefore does not have a cognizable procedural due process claim.

<sup>5</sup> See, e.g., Alyssa Peterson & Arjun Mody, *How Employers Illegally Discriminate Against Veterans with Less-than-Honorable Discharges*, HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW, AMICUS BLOG, available at <https://harvardcrcl.org/how-employers-illegally-discriminate-against-veterans-with-less-than-honorable-discharges/>.

**B. Ms. Smith could bring an equal protection claim, but it would be unlikely to succeed.**

The due process provision of the Fifth Amendment guarantees equal protection of the laws. Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The equal protection analysis uses three levels of judicial review: rational basis review for members of non-protected classes; heightened scrutiny for members of “quasi-suspect” classes; and strict scrutiny for “suspect” classes. See Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Under rational basis review, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” Id. at 440.

In 2003, the Supreme Court decided Lawrence v. Texas, the landmark LGB rights case overturning a state statute that criminalized sodomy. 539 U.S. 558 (2003). The Court decided Lawrence on substantive due process grounds, not on equal protection grounds. See id. at 574–75, 578. See also Witt v. Dep’t of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (declining to overturn Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997), which rejected equal protection challenge to DADT, because Philips’s “holding was not disturbed by Lawrence, which declined to address equal protection”). Lawrence therefore did not designate sexual orientation as a suspect or protected class for purposes of the equal protection analysis. Multiple circuit courts, both pre- and post-Lawrence, have rejected equal protection challenges to DADT, which they found to satisfy rational basis review. See Witt, 527 F.3d at 821; Cook v. Gates, 528 F.3d 42, 62 (1st Cir. 2008); Able v. United States, 155 F.3d 628, 635 (2d Cir. 1998); Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1424–25 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996).

The status of sexual orientation in the equal protection analysis is less clear following

Obergefell v. Hodges, which found that same-sex couples have a right to marry under both the equal protection and due process clauses. 135 S. Ct. 2584, 2604 (2015). The Supreme Court predicated its decision in Obergefell on the notion of a fundamental right to marriage and did not explicitly address the appropriate level of scrutiny to be applied to LGB individuals. See id. Some have argued that sexual orientation should be a protected class.<sup>6</sup> However, no circuit has addressed the appropriate level of scrutiny for an equal protection challenge dealing with LGB rights post-Obergefell. Ms. Smith could bring an equal protection challenge to her discharge, but she would be fighting against both a line of cases finding that DADT satisfies rational basis and the legal uncertainty regarding sexual orientation as a class. An equal protection claim would therefore be unlikely to succeed.

**C. Ms. Smith can claim that her discharge violated her substantive due process rights under the Witt standard.**

In Witt v. Dep't of the Air Force, the Ninth Circuit addressed a constitutional challenge to DADT brought by Major Margaret Witt, who was discharged under the policy in 2004. 527 F.3d 806 (9th Cir. 2008). The court based its analysis of Major Witt's substantive due process claim on Lawrence. It concluded that the Supreme Court in Lawrence applied a heightened level of scrutiny to the Texas sodomy law, which implicated the liberty of individuals to choose their personal relationships and private conduct. Id. at 817.

Once the court established that Lawrence mandated a heightened level of scrutiny, it looked to Sell v. United States, 539 U.S. 166 (2003), another Supreme Court case decided the same year as Lawrence. In Sell, the Supreme Court considered whether the Constitution permits the government to forcibly administer antipsychotic drugs to a mentally-ill defendant in order to render

<sup>6</sup> See, e.g., Daniel J. Galvin, Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation is Long Overdue*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 405 (2019).

that defendant competent to stand trial. Sell held that because the defendant had a “significant constitutionally protected liberty interest” at stake, the drugs could be administered forcibly only if [1] there were “important governmental interests” at stake; [2] the involuntary medication would “significantly further” those state interests; [3] the involuntary medication was “necessary” to further those interests; and [4] the medication was medically appropriate. Witt, 527 F.3d at 818–19 (quoting Sell, 539 U.S. at 180–81). The Ninth Circuit chose to adopt the test employed in Sell (excluding the fourth factor, which was specific to the medical context). It reasoned that “[a]lthough the Court’s holding in Sell is specific to the context of forcibly administering medication, the scrutiny employed by the Court to reach that holding is instructive.” Id. at 818. Thus, the Ninth Circuit held that “when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, [1] the government must advance an important governmental interest, [2] the intrusion must significantly further that interest, and [3] the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government’s interest.” Id. at 819. This standard is intended to be used in the context of as-applied challenges, not facial challenges. See id.

On remand, the District Court for the Western District of Washington found that Major Witt’s discharge under DADT violated substantive due process. Witt v. United States Dep’t of the Air Force, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010). The court found that only the first factor was satisfied, id. at 1313, referencing the Ninth’s Circuit’s finding that DADT’s concern with management of the military constituted an important governmental interest, see Witt, 527 F.3d at 821. The court also cited DADT’s legislative findings, see Section II.A, supra, at 11, as evidence of governmental purpose, Witt, 739 F. Supp. at 1310–11. This inquiry closely parallels

the rational basis analysis, which DADT clearly satisfied at that time. See Section II.A, supra, at 11.

The District Court next found that the second and third factors were not satisfied because there was no evidence that Major Witt's discharge in any way advanced the goal of maintaining unit morale and cohesion. 739 F. Supp. 2d at 1315. The court noted that, to the contrary, Major Witt was a valuable asset and her discharge impaired her unit's ability to achieve its mission. Id.

Like Major Witt, Ms. Smith was an excellent worker who made valuable contributions to her unit's mission. However, Ms. Smith's case involves more complicated facts than Major Witt's. There was ongoing sexual harassment by other lesbian women on the USS Coronado, which worsened morale and affected the workplace environment.

With respect to the second requirement that the discharge "significantly further" the important governmental interest, the government could argue that the presence of any LGB individuals worsened the work environment, regardless of whether or not they were involved in the harassment. Captain Chang claimed that having lesbians on the ship in general affected morale. Ms. Smith could respond that because many other lesbian women remained on the ship—all but Ms. Smith and her partner—Ms. Smith's discharge alone cannot be said to have significantly improved the poor morale allegedly stemming from the presence of LGB people.

Research about the state of the military following DADT's repeal provides further evidence that Ms. Smith's discharge did not significantly further a governmental interest. Since DADT's repeal, there has been no indication that the repeal negatively affected military readiness, unit cohesion, recruitment, retention, or morale.<sup>7</sup> This research supports the assertion that allowing Ms.

<sup>7</sup> See Charlie Joughin, *Two Years After 'Don't Ask, Don't Tell' Repeal, Threats of Gay "Chaos" Still Groundless*, HUMAN RIGHTS CAMPAIGN – BLOG (Sept. 19, 2013); UCLA SCHOOL OF LAW - PALM CENTER, *ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL'S IMPACT ON MILITARY READINESS* (Sept. 20, 2012).

Smith to continue serving would not have negatively affected her unit.

Additionally, further factual development would be helpful in analyzing the second factor. LSC could solicit testimony from Captain Garcia, a supervisor who was highly complimentary of Ms. Smith, about how (if at all) Ms. Smith's discharge affected her unit.

With respect to the third factor, necessity, there are further factual issues. Ms. Smith's letter responding to the initiation of discharge proceedings stated that the issues stemming from her sexuality could not be solved by a transfer to another ship. This could indicate that there was no alternative to Ms. Smith's discharge. However, this was only Ms. Smith's opinion at that time, and can be countered by other evidence. First, Captain Chang stated in an interview that he could have transferred either Ms. Smith or her partner to "break up" their relationship. Second, commanding officers discharged Ms. Smith and her partner, but none of the other LGB individuals who actually engaged in sexual conduct or sexual harassment on the ship. These facts indicate that Ms. Smith's discharge was not necessary to preserve military order.

The adverse facts in Ms. Smith's case are not fatal. With further factual development, Ms. Smith could show that her discharge violated the Witt substantive due process standard.

**D. Any constitutional claims should be brought before the BCNR and subsequently the D.C. District Court if the BCNR decision is unfavorable.**

**i. Ms. Smith's constitutional claims should be administratively exhausted at the BCNR.**

A veteran must exhaust administrative remedies before a court can consider his or her constitutional claims. See Bois v. Marsh, 801 F.2d 462, 467 (D.C. Cir. 1986). The Board for the Correction of Naval Records (BCNR) would be the appropriate administrative venue for Ms. Smith to bring a constitutional argument. The BCNR has broad authority to alter military records in response to an "error or injustice." 32 C.F.R. § 723.2. Under this authority, the BCNR could

provide the additional relief Ms. Smith seeks. However, because the BCNR is unlikely to do so, see supra, at 4, Ms. Smith would likely need to bring her constitutional claims to federal court.

**ii. Ms. Smith’s constitutional claims should be brought within the D.C. Circuit because the First Circuit has rejected the Witt standard.**

The proper venue for claims against the United States or an agency thereof is “any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.” 28 U.S.C. § 1391(e)(1).

Because Ms. Smith is a resident of the state of Maine, she could bring suit against the federal government in the District of Maine. She could alternatively bring suit in the District of Columbia, where the federal government resides. The choice between these two venues depends upon which circuit has more favorable substantive law.

Only the First Circuit has directly addressed the Witt standard. In Cook v. Gates, the First Circuit expressly rejected the Ninth Circuit’s approach on the basis that DADT, a Congressional action governing the military, was entitled to a high degree of deference. 528 F.3d 42, 57–58 (1st Cir. 2008). According to the First Circuit, “[i]t is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.” Id. at 57 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

Because the First Circuit has rejected the Witt standard, a substantive due process claim using that standard would have to be brought in the D.C. Circuit. The D.C. Circuit has not had occasion to address Witt. However, in the recent case Doe v. Shanahan, it addressed the issue of

balancing deference to the military against individual rights in the context of the policy restricting transgender individuals from entering the military. 917 F.3d 694 (D.C. Cir. 2019). This case involved the dissolution of a preliminary injunction based on changed circumstances and therefore did not present the court with the opportunity to review the injunction on the merits. Id. at 695. However, the court nevertheless indicated its view that the military’s justification for the policy was sufficient:

[W]e must recognize that the [transgender policy] plausibly relies upon the considered professional judgment of appropriate military officials, and appears to permit some transgender individuals to serve in the military consistent with established military mental health, physical health, and sex-based standards. In light of the substantial constitutional arguments and the apparent showing that the policy accommodates at least some of Plaintiffs’ interests, we think that the public interest weighs in favor of dissolving the injunction.

Id. (internal quotations omitted).

Shanahan indicates that the D.C. Circuit might prioritize military deference over individual rights if presented with a claim based on DADT. However, a DADT discharge case can be distinguished from Shanahan in a number of ways. First, because DADT was repealed, a finding that a DADT discharge violated an individual’s constitutional rights would not have any effect on future military practices, and thus would not implicate the policy concerns motivating judicial deference to the military. Second, the Supreme Court granted LGB individuals some constitutional protections in Lawrence and Obergefell, while transgender rights have yet to receive such recognition.

Additionally, there is some helpful language in the Shanahan concurrence, which was written by Judge Robert L. Wilkins and joined by Senior Judge Stephen F. Williams:

The fact that a military policy is involved certainly counsels greater deference to Congress and the Executive, but . . . *the standard of review cannot be easily quantified using a specific degree of deference or level of scrutiny*. Rather, our review involves the careful assessment of a number of factors, including whether the policy is facially neutral, whether

it targets a suspect class, whether the class is similarly situated to others affected, whether the policy was motivated by animus, whether it infringes upon a fundamental right (and, if so, how), what military purposes are furthered by the policy, whether those purposes are legitimate, and whether Congress or the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner, given the rights at issue.

Id. at 704 (Wilkins, J., concurring) (emphasis added). This more holistic approach indicates that some D.C. Circuit judges might be open to adopting the Witt test, and that therefore Ms. Smith's case could be successful on appeal given the right panel. Thus, if LSC decides to advance the substantive due process argument, that claim should be brought in the D.C. Circuit.

**E. As there are no statutory or implied causes of action available, a constitutional claim would need to be pled directly under the Constitution.**

**i. Ms. Smith is outside the Tucker Act's statute of limitations.**

The Tucker Act permits the United States Court of Federal Claims to entertain suits against the federal government in certain circumstances. See 28 U.S.C. § 1491(a)(1). To bring a claim under the Tucker Act, a plaintiff must "assert a money-mandating source of substantive law and a violation of the Constitution, a statute, or a regulation." Starr Int'l Co. v. United States, 856 F.3d 953, 984 (Fed. Cir. 2017). See also United States v. Navajo Nation, 556 U.S. 287, 289–90 (2009). For veterans, the relevant money-mandating statute is the Military Pay Act, which allows veterans to receive backpay if they were unlawfully discharged. See 37 U.S.C. § 204; Martinez v. United States, 333 F.3d 1295, 1302–03 (Fed. Cir. 2003). The Tucker Act has a six-year statute of limitations. 28 U.S.C. § 2501.<sup>8</sup>

A claim of unlawful discharge due to a constitutional violation is cognizable under the Tucker Act and Military Pay Act. However, Ms. Smith's case (and that of any servicemember discharged under DADT, which was repealed in 2011) is outside the six-year statute of limitations.

<sup>8</sup> The so-called "Little Tucker Act" allows similar suits to be brought in the federal district courts. 28 U.S.C. § 1346(a)(2). The Little Tucker Act has the same statute of limitations as the Tucker Act. See 28 U.S.C. § 2401.

There are no exceptions to the Tucker Act’s statute of limitations, which courts have long treated as a jurisdictional requirement. See John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134–135 (2008) (citing Kendall v. United States, 107 U.S. 123, 125–126 (1883)). Ms. Smith therefore cannot claim back pay under the Tucker Act.

**ii. Ms. Smith can bring a standalone constitutional claim for injunctive relief in the D.C. Circuit, as such claims would likely not be Feres-barred.**

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics established an implied right of action for plaintiffs seeking damages for violations of constitutional rights by the federal government. 403 U.S. 388, 403–04 (1971). The Bivens remedy is unavailable when a case (1) involves a “new context” or (2) implicates “special factors.” Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017). Because the military context involves special factors, the military is immune from Bivens suits. Chappell v. Wallace, 462 U.S. 296, 304 (1983).

Though damages are unavailable for constitutional claims against the military, similar claims for equitable relief are cognizable under a federal court’s “inherent equitable powers,” Missouri v. Jenkins, 495 U.S. 33, 51 (1990), which are “traditionally available to enforce federal law” in the absence of Congressional action to foreclose equitable remedies. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385–86 (2015). Thus, a plaintiff is able to seek injunctive relief for a constitutional violation in the federal courts.

The Feres doctrine is a potential roadblock to equitable constitutional claims by servicemembers and veterans, who are barred from bringing certain claims when their injuries “arise out of or are in the course of activity incident to service.” Feres v. United States, 340 U.S. 135, 146 (1950). See also Lanus v. United States, 570 U.S. 932, 932 (2012) (denying cert petition requesting reconsideration of Feres); United States v. Johnson, 481 U.S. 681, 682–85 (1987)

(affirming Feres). The Supreme Court developed the Feres doctrine because suits based on service-related injuries would “involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness” and “[implicate] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission.” Johnson, 481 U.S. at 691 (quoting United States v. Shearer, 473 U.S. 52, 57 (1985)).

The D.C. Circuit has never squarely addressed whether Feres applies to equitable constitutional claims. However, it has entertained such claims in the past. See Roberts v. United States, 741 F.3d 152, 161–62 (D.C. Cir. 2014) (denying, but reaching merits of, veteran’s equal protection and due process challenges to BCNR decision); Emory v. Sec’y of the Navy, 819 F.2d 291, 294 (D.C. Cir. 1987) (rejecting claim that equal protection challenge to promotion system was nonjusticiable). See also Brannum v. Lake, 311 F.3d 1127, 1130 (D.C. Cir. 2002) (holding both facial and as-applied constitutional challenges are potentially permissible under Feres, but declining to define precise bounds of Feres doctrine). Other circuits have explicitly held that Feres does not bar constitutional claims against the military for equitable relief. See Wilkins v. United States, 279 F.3d 782, 789 (9th Cir. 2002); Garcia v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 52 (2d Cir. 1999); Walden v. Bartlett, 840 F.2d 771, 775 (10th Cir. 1988); Jorden v. Nat’l Guard Bureau, 799 F.2d 99, 100 (3d Cir. 1986); Katcoff v. Marsh, 755 F.2d 223, 231 (2d Cir. 1985). Given that the D.C. Circuit has entertained equitable constitutional claims, an approach that has substantial circuit support, the D.C. Circuit is unlikely to apply Feres to Ms. Smith’s claims.

On the other hand, some D.C. District Court cases have extended Feres to constitutional claims for equitable relief. See Daisher v. Mineta, No. 1:01-CV-1059, 2006 U.S. Dist. LEXIS 9991, at \*10 (D.D.C. 2006); Chandler v. Roche, 215 F. Supp. 2d 166, 170 (D.D.C. 2002). See also

Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1008 (8th Cir. 1989). Daisher, Chandler, and Watson all cited Chappell to support the proposition that Feres barred equitable constitutional claims. Id. However, this approach seems to overextend Chappell, which only held that Bivens claims were barred under the special factors analysis. See Chappell, 462 U.S. at 305. In fact, the Chappell court stated that it “has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.” Id. at 304. See also United States v. Stanley 483 U.S. 669, 705 (1987) (Brennan, J., concurring in part and dissenting in part) (“Feres should not thoughtlessly be imposed to prevent redress of an intentional constitutional violation.”)

While unlikely, if the D.C. Circuit were to extend Feres to equitable constitutional claims, it would use a three-factor analysis to determine whether a servicemember’s claim was based on an injury “incident to service” and thus Feres-barred: (1) the servicemember’s duty status, (2) the site of the injury, and (3) the nature of the activity the servicemember engaged in at the time of injury. Schnitzer v. Harvey, 389 F.3d 200, 203 (D.C. Cir. 2004). No single factor is dispositive; rather, the analysis looks to the “totality of the circumstances.” Id.

Ms. Smith satisfies the first and second factors of the D.C. Circuit’s Feres test because at the time of her injury (her discharge), she was on active duty status and she was physically present on the USS Coronado. These facts alone are sufficient to establish that her injury occurred incident to service. Cf. Schnitzer v. Harvey, 389 F.3d 200 (D.C. Cir. 2004) (holding military prisoner’s injury resulting from ceiling collapsing while he was watching television was “incident to service” because he was on active duty and in a military prison); Verma v. United States, 19 F.3d 646, 648 (D.C. Cir. 1994) (holding that alleged conversion of servicemember’s biological samples was “incident to service” because it “took place at an Army facility, while the former servicemember

was on active status in the Army”). Claims based on Ms. Smith’s discharge would therefore be Feres-barred under the D.C. Circuit’s test, if strictly applied. However, Ms. Smith could potentially overcome the Feres bar with a policy argument.

The D.C. Circuit has stated that the Supreme Court’s rationale for the Feres doctrine is unimportant in its decision-making process, which looks solely to the three-factor test. See Verma, 19 F.3d at 648. While this approach does somewhat fit within the Supreme Court’s emphasis on the “incident to service” test, the Supreme Court, unlike the D.C. Circuit, has chosen not to focus on narrow factors. To the contrary, the Supreme Court has advised that “[t]he Feres doctrine cannot be reduced to a few bright-line rules,” Shearer, 473 U.S. at 57, and has placed great emphasis on Feres’s policy rationale, see id.

In Shearer, which dealt with the murder of an Army private by another private while he was off duty and off base, the Supreme Court found that the decedent’s injury occurred incident to service. Id. at 53. The decedent’s administratrix claimed the Army was negligent because it was aware of the assailant’s violent tendencies and failed to either control him or warn others of the threat he posed. Id. at 53–54. The Court overturned the Third Circuit’s decision, which found for the decedent on the basis that he was off duty and away from the base when he was murdered. Id. at 57. The Court reasoned that “the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline.” Id. Thus, the Court found the policy rationale of Feres determinative, while the servicemember’s duty status and the site of the injury—the first and second factors of the D.C. Circuit’s test—were far less important.

Unlike Shearer, Ms. Smith’s case does not implicate Feres’s policy rationale. DADT is a repealed policy that no longer affects the military. Providing a remedy for actions taken pursuant

to a policy that is no longer in effect would have no bearing on the operation of the military; rather, it would only provide relief for past wrongs. Allowing a narrow exception to Feres for DADT would not involve courts in military decision-making or discipline in the future. Thus, under the Supreme Court's reasoning in Shearer, Feres should not apply in this situation.

As the D.C. Circuit has entertained some equitable constitutional claims by servicemembers in the past, it is unlikely to apply Feres to such claims. However, it has avoided explicitly defining the bounds of the Feres doctrine. If the D.C. Circuit applied Feres to Ms. Smith's equitable constitutional claims, she could potentially overcome the Feres bar using a policy argument that differentiates DADT discharges from other contexts.

### CONCLUSION

The most viable avenue to challenge Ms. Smith's discharge under DADT is a substantive due process claim using the Witt standard, pled directly under the Constitution. Ms. Smith could also bring an equal protection claim, although this argument is substantially weaker. If LSC decides to pursue these claims, Ms. Smith would first need to exhaust administrative remedies at the BCNR. LSC could then take Ms. Smith's case to the United States District Court for the District of Columbia.

## Applicant Details

First Name	<b>Candace</b>
Middle Initial	<b>Dani</b>
Last Name	<b>Fong</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:danielle.fong@memphis.edu">danielle.fong@memphis.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>1821 Mignon Avenue</b>  <b>City</b>  <b>Memphis</b>  <b>State/Territory</b>  <b>Tennessee</b>  <b>Zip</b>  <b>38107</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	<b>9013413360</b>

## Applicant Education

BA/BS From	<b>University of Memphis</b>
Date of BA/BS	<b>May 2018</b>
JD/LLB From	<b>The University of Memphis--Cecil C. Humphreys School of Law</b>
	<a href="http://www.memphis.edu/law/index.php">http://www.memphis.edu/law/index.php</a>
Date of JD/LLB	<b>May 20, 2022</b>
Class Rank	<b>33%</b>
Does the law school have a Law Review/Journal?	<b>Yes</b>
Law Review/Journal	<b>No</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>National Moot Court Travel Team</b>
	<b>Moot Court Executive Board</b>

## Bar Admission

### **Prior Judicial Experience**

Judicial Internships/ Externships	<b>Yes</b>
Post-graduate Judicial Law Clerk	<b>No</b>

### **Specialized Work Experience**

### **Professional Organization**

Organizations	<b>Student Bar Association – 1L Bar Governor, Director of Events, President Moot Court Board – Associate Chief Justice University of Memphis, Board of Trustees – Student Trustee, 2020 - 2021 National Society of Leadership and Success – Member Asian Pacific American Law Student Association – Community Liaison</b>
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### **Recommenders**

Stimac, Lauran  
lstimac@gwtclaw.com  
Kathy, Steuer  
kathy.steuer@stjude.org  
Kritchevsky, Barbara  
bkrthvs@memphis.edu  
9016782339

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

**DANIELLE FONG**

Danielle.Fong@memphis.edu | (901) 341 - 3360  
1821 Mignon Avenue | Memphis, TN 38107

The Honorable John T. Copenhaver, Jr.  
Senior Judge  
6009 Robert C. Byrd United States Courthouse  
300 Virginia Street East  
Charleston, WV 25301

Dear Judge Copenhaver:

I write to express my interest in a clerkship for the 2022–2023 term with the United States District Court for the Southern District of West Virginia. Currently, I am a third-year student at the University of Memphis Cecil C. Humphreys School of Law. Research and writing are the foundation of my educational experience, and I am eager to develop these skills in a public service position while gaining insight into the inner workings of a district court.

In law school, I sought out opportunities to build my research and writing skills. As a second-year student, I externed with U.S. Circuit Judge for the Sixth Circuit Court of Appeals Bernice Donald and competed on my school's National Moot Court team. Working in chambers and on a travel team required the ability to produce research and writing that effectively navigated complex issues of federal law under strict time constraints. The next semester, I externed with St. Jude's Legal Office, where I analyzed recent issues in healthcare such as telehealth, protected health information, risk management, and regulatory compliance. My recent clerkship with a civil defense firm entailed thoroughly reviewing trial briefs and records, drafting trial court documents and other legal memoranda, and researching complex issues in existing civil law. I am also writing a health law seminar paper examining the need for the legal educational system and profession to become trauma responsive and disability inclusive to improve diversity and professional wellbeing.

Throughout my education, I have worked in restaurants to support myself and independently fund my education. Successfully balancing school and work demands effective time management and organizational skills and the ability to prioritize important tasks while working independently. Working in fine dining restaurants further enables me to efficiently manage fast-paced, dynamic, team-oriented environments while offering a high standard of service to guests.

Enclosed is a resume, law school transcript, two writing samples, and a reference list for your review. I would be deeply grateful for the opportunity to speak with you regarding a potential clerkship position in your chambers. I appreciate your time and consideration to my application.

Sincerely,



Danielle Fong

## DANIELLE FONG

[Danielle.Fong@memphis.edu](mailto:Danielle.Fong@memphis.edu) | (901) 341 - 3360  
1821 Mignon Avenue | Memphis, TN 38107

### EDUCATION

- Graduating May 2022 **University of Memphis, Cecil C. Humphreys School of Law**  
*Juris Doctor Candidate*
- Dean's Distinguished Service Award – 2022
  - Moot Court Executive Board – Associate Chief Justice
  - Student Bar Association – President, Director of Events, 1L Bar Governor
  - University of Memphis, Board of Trustees – Student Trustee, 2020 - 2021
  - Leo Bearman Sr. American Inn of Court – Pupil, 2021 - 2022
  - Cultural Competence Fellow – 2021 - 2022
  - National Society of Leadership and Success – Member, 2021
  - OutLaw – Main Campus Liaison
  - Asian Pacific American Law Student Association – Community Liaison
  - National Moot Court Travel Team – Fall 2020
  - First Year Moot Court Competition – Top Ten Oral Advocates, Spring 2020
  - Legal Methods II – Best Oral Argument, Spring 2020
- August 2015 – May 2018 **University of Memphis**  
*Bachelor of Arts in English, Magna Cum Laude*
- 3.95 GPA
  - Phi Kappa Phi Society
  - Worked full-time throughout my studies to independently fund myself and my education
- August 2013 – May 2014 **New York University in London**
- Studies in English, Cultural and Social Studies, Philosophy, and Psychology
  - New York University Liberal Studies Student Council – Events Chair
  - Community Service Award – Gold Key

### EXPERIENCE

- May – August 2021 **Glassman, Wyatt, Tuttle & Cox**  
*Law Clerk*
- Drafted memorandums, motions, complaints, and other trial court documents
  - Attended depositions, motion hearings, focus groups, oral argument, and client intake
- January – April 2021 **St. Jude Children's Research Hospital**  
*Legal Extern*
- Redlined contracts, research agreements, and hospital policy
  - Drafted research memorandums on telehealth, patient privacy, risk management
  - Attended meetings regarding patient custody, medical research, clinical trials
- August – December 2020 **United States Court of Appeals for the Sixth Circuit**  
*Legal Extern for the Honorable Judge Bernice B. Donald*
- Drafted FRAP 34 motions, case summaries, en banc rehearing petitions, and staff attorneys' orders
  - Reviewed cases using the Case Management / Electronic Case Filing (CM/ECF) system

**DANIELLE FONG**

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 1821 Mignon Avenue | Memphis, TN 38107

**THE UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW**  
**UNOFFICIAL TRANSCRIPT OF GRADES**

**Fall Semester 2019**

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Civil Procedure I	3	2.00
Contracts I	3	2.33
Legal Methods I	3	3.00
Property I	3	3.00
Torts I	3	4.00
Fall Semester 2019	15	2.86/4.00

**Spring Semester 2020**

\*pass or fail grading scale used due to COVID-19

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Civil Procedure II	3	P*
Contracts II	3	P*
Legal Methods II	3	P*
Property II <sup>1</sup>	3	P*
Torts II <sup>2</sup>	3	P*
Spring Semester 2020	15	2.86/4.00
Cumulative	30	2.86/4.00

<sup>1</sup> Scored in the top ten of the class.

<sup>2</sup> High Pass.

This unofficial transcript may be verified by contacting the Law School Registrar, Jamie Johnson at (901) 678-2660.

**DANIELLE FONG**

Danielle.Fong@memphis.edu | (901) 341 - 3360  
1821 Mignon Avenue | Memphis, TN 38107

**THE UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW**  
**UNOFFICIAL TRANSCRIPT OF GRADES**

**Fall Semester 2020**

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Appellate Advocacy	3	3.67
Administrative Law	3	3.67
Evidence	4	3.00
Externship	3	S
Moot Court Travel Team	2	E
Fall Semester 2020	15	3.40/4.00

**Spring Semester 2021**

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Business Organizations I	3	3.00
Constitutional Law	4	3.33
Criminal Procedure I	3	2.67
Externship	3	E
Spring Semester 2021	12	3.03/4.00
Cumulative	27	3.06/4.00

This unofficial transcript may be verified by contacting the Law School Registrar, Jamie Johnson at (901) 678-2660.

**DANIELLE FONG**

[Danielle.Fong@memphis.edu](mailto:Danielle.Fong@memphis.edu) | (901) 341 - 3360  
 1821 Mignon Avenue | Memphis, TN 38107

**THE UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW**  
**UNOFFICIAL TRANSCRIPT OF GRADES**

**Fall Semester 2021**

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Decedents' Estates	3	2.67
Fair Employment Practices	3	2.33
Family Law	3	3.33
Intellectual Property Survey	3	4.00
Medical Legal Partnership Clinic	4	2.67
<hr/>		
Fall Semester 2021	16	3.03/4.00

**Spring Semester 2022**

<u>Class</u>	<u>Hours</u>	<u>Grade</u>
Bar Exam Preparation	3	TBD
Health Law Seminar	2	TBD
Legislation	3	TBD
Moot Court Executive Board	3	TBD
Professional Responsibility	2	TBD
Secured Transactions	3	TBD
Trial Advocacy	3	3.67
<hr/>		
Spring Semester 2022	19	
<hr/>		
Cumulative	35	/4.00

*Anticipated Date of Degree Conferral*

May 15, 2022

This unofficial transcript may be verified by contacting the Law School Registrar, Jamie Johnson at (901) 678-2660.

May 18, 2022

The Honorable John Copenhaver, Jr.  
Robert C. Byrd United States Courthouse  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

Dear Judge Copenhaver:

Please allow this correspondence to serve as a letter of recommendation for Candace (Danielle) Fong. It is my understanding that Ms. Fong is applying for a clerkship in your Court, and it is my privilege to recommend her for that position. During her tenure with our Firm as a student law clerk in the summer of 2021, Ms. Fong demonstrated her willingness to work hard and learn new aspects of the law on a daily basis. She was always eager to take advantage of observation opportunities, and our attorneys never hesitated to offer her those opportunities because she conducted herself professionally and respectfully at all times. Ms. Fong paid attention to detail in completing her research and writing assignments, and her work resulted in meaningful contributions to the cases on which she worked. In addition to her excellent work ethic, high quality work product, Ms. Fong has a positive attitude and a pleasant demeanor, making her a joy to have in the office.

Sincerely yours,

/s Lauran G. Stimac

Glassman, Wyatt, Tuttle & Cox, P.C.

26 North Second Street

Memphis, TN 38103

(901) 527-4673

lstimac@gwtclaw.com

Lauran Stimac - lstimac@gwtclaw.com

May 18, 2022

The Honorable John Copenhaver, Jr.  
Robert C. Byrd United States Courthouse  
300 Virginia Street East, Room 6009  
Charleston, WV 25301

Dear Judge Copenhaver:

Re Candace Danielle Fong

I write to enthusiastically endorse Danielle Fong for a clerkship. Danielle was a legal intern in the Office of Legal Services at St. Jude Children's Research Hospital during the Spring of 2021. Danielle demonstrated a strong work ethic and commitment to understanding the reason behind the assignment and to getting it right. I had ample opportunity to witness this, as she worked on two legal research memoranda for me, one on telehealth and the other on the Telephone Consumer Protection Act. She also assisted me in updating four informed consent documents for different patient procedures and treatments. Danielle also has a lovely and caring personality.

Since her internship, i have seen Danielle at an event or two at the law school, where she showed an interest in the larger legal issues and events in the community. I hope you will select her as a law clerk.

Your honor may reach me at 901-595-2468 or [katherine.steuer@stjude.org](mailto:katherine.steuer@stjude.org) with any questions.

Sincerely yours,

Katherine B. Steuer,  
Managing Counsel, Health Affairs

Steuer Kathy - [kathy.steuer@stjude.org](mailto:kathy.steuer@stjude.org)

## **MEMORANDUM**

**TO:** Richard Glassman  
**FROM:** Danielle Fong & Alexxas Johnson  
**DATE:** June 9, 2021  
**FILE:** REDACTED  
**RE:** Constructive / Resulting Trust

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### **QUESTION PRESENTED**

Under Tennessee law, did the parties establish a resulting or constructive trust during their real estate business dealings?

### **BRIEF ANSWER**

Under Tennessee law, it is not likely that a court will find a resulting trust between the Plaintiff (now deceased) and the Defendant; however, there is more evidence to support the finding of a constructive trust.

### **FACTS**

The Plaintiff (now deceased) and the Defendant were long-time friends and business partners. The Defendant is in the business of dealing diamonds as well as real estate. According to the Defendant, he and the Plaintiff were 50/50 partners on at least six (6) rental properties despite some documentation stating that the Plaintiff was to be sixty percent (60%) owner and the Defendant being forty percent (40%) owner. The Defendant stated that he and the Plaintiff were partners in multiple business industries. Following the Plaintiff's death, his brother brought suit against the Defendant to recover monies owed to the Plaintiff as a result of he and the Defendant's partnerships.

## DISCUSSION

Constructive trusts and resulting trusts are equitable remedies that a court imposes to prevent unjust enrichment. *Story v. Lanier*, 166 S.W.3d 167, 184 (Tenn. App. 2004). Courts may enforce both forms of implied trusts upon real estate. *Id.* at 184-85. Tennessee courts require a higher degree of proof when a party seeks to establish a trust in real property based on parol evidence. *See Gray v. Todd*, 819 S.W.2d 104, 108 (Tenn. Ct. App. 1991). While both types of trusts may be proved by parol evidence, both must be established by clear and convincing evidence. *Story*, 166 S.W.3d at 184-85.

A constructive trust is one created by equity to satisfy the demands of justice. *Akers v. Gillentine*, 231 S.W.2d 369, 371 (1948). A constructive trust arises against one who:

. . . by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal title to property which he ought not, in equity and good conscience hold and enjoy.

*Harris v. Smith*, No. E201900906COAR3CV, 2020 WL 1893640, at \*2 (Tenn. App. Apr. 16, 2020) (quoting *Livesay v. Keaton*, 611 S.W.2d 581, 584 (Tenn.App.1980) (citation omitted)). There is no requirement that a “bad act” by the beneficiary occur for a constructive trust to arise. *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 725 (Tenn. Ct. App. 1998); *Roach v. Renfro*, 989 S.W.2d 335 (Tenn. Ct. App. 1998).

A court may impose a constructive trust in four situations: (1) where a person procures the legal title in violation of some duty, express or implied to the true owner; (2) where title to the property is obtained by fraud, duress, or other inequitable means; (3) where a person uses some relationship or influence to obtain legal title upon more advantageous terms than could be otherwise obtained; or (4) where a person acquires property knowing that another is entitled to its

benefits. *Arnold v. Bowman*, No. E2004-01151-COA-R3-CV, 2005 WL 1488679, at \*6 (Tenn. Ct. App. June 23, 2005) (citing *Tanner v. Tanner*, 698 S.W.2d 342, 345-46 (Tenn. 1985)).

While a constructive trust is substantively like a resulting trust, resulting trusts typically arise when there is a legal presumption that the parties intended to create a trust. *Story*, 161 S.W.3d at 184. A resulting trust is defined by courts as:

[A]rising from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and there ordinarily being no fraud or constructive fraud involved.

*Id.* (quoting *In re Estate of Nichols*, 856 S.W.2d 397, 401 (Tenn. 1993) (citations omitted)).

In other words, a resulting trust arises “where the legal estate is disposed of, or acquired, *without* bad faith, and under such circumstances that [e]quity infers or assumes that the beneficial interest in said estate is not to go with the legal title.” *Harwell v. Watson*, No. E2003-01796-COA-R3CV, 2004 WL 1434505, at \*3 (Tenn. App. June 25, 2004) (emphasis added). Resulting trusts are also known as “presumptive trusts,” because the law presumed the trust was “intended by the parties from the nature and character of their actions.” *Browder v. Hite*, 602 S.W.2d 489, 492 (Tenn. Ct. App. 1980). Like a constructive trust, the party alleging the existence of a resulting trust must prove its existence by clear and convincing evidence. *Saddler v. Saddler*, 59 S.W.3d 96, 99 (Tenn. Ct. App. 2000); *Rowlett v. Guthrie*, 867 S.W.2d 732, 735 (Tenn. Ct. App. 1993); *Wardell v. Dailey*, 674 S.W.2d 293, 295 (Tenn. Ct. App. 1984).

Generally, resulting trusts arise “(1) on a failure of an express trust or the purpose of such a trust, or (2) on a conveyance to one person on a consideration from another,” or (3) in circumstances that a court of equity decrees such to prevent a “failure of justice.” *Story*, 166 S.W.3d at 184 (Tenn. App. 2004). The most common circumstance in which a resulting trust

arises involves the purchase of property where one party pays consideration and the title vests in another party. *Keeton v. Daniel*, No. M2005-01199-COA-R3CV, 2006 WL 2818238, at \*5 (Tenn. App. Oct. 2, 2006); *see Browder v. Hite*, 602 S.W.2d 489, 492 (Tenn. Ct. App. 1980) (including in a list of circumstances giving rise to a trust “[w]here the purchaser pays for the land but takes the title, *in whole or in part*, in the name of another”) (emphasis added). The theory underlying the remedy of a resulting trust in those situations is explained as:

It is said that the source and underlying principle of all resulting trusts is the equitable theory of consideration. That theory is that the payment of a valuable consideration draws to it the beneficial ownership; that a trust follows or goes with the real consideration, or results to him from whom the consideration actually comes; that *the owner of the money that pays for the property should be the owner of the property*. Pomeroy's Eq. Jur. (5th ed), secs. 981, 1031, 1037; 2 Lawrence on Eq. Jur. (1929 ed.), sec. 565 (emphasis added).

*Smalling v. Terrell*, 943 S.W.2d 397, 400 (Tenn. Ct. App. 1996); *Livesay*, 611 S.W.2d at 584; *Greene v. Greene*, 272 S.W.2d 483, 487 (Tenn. 1954).

A constructive trust is the most likely remedy that the court may award in this case. While there are some factors that weigh in favor of a resulting trust, there is not sufficient evidence does not suggest that the Plaintiff and the Defendant intended to create a trust. There is evidence that the Plaintiff paid consideration for some properties, and the Defendant admits himself that he and the Plaintiff were partners in their real estate dealings. At most, there is a reasonable inference that, because the Plaintiff and the Defendant conducted so much business together, that they jointly owned property together, or intended to own it together (with the Defendant's name on the deed, and the Plaintiff financially invested).

A constructive or resulting trust can be established by parol evidence, but it “generally requires a greater degree of proof than a mere preponderance of the evidence.” *Harris v. Smith*, 2020 WL 1893640, at \*4 (*quoting Browder v. Hite*, 602 S.W.2d 489, 493 (Tenn. Ct. App. 1980)).

In the present case, the Defendant testifies repeatedly in his deposition that he and the Plaintiff's business was by "word of mouth" or done "by shaking hands," and that they were "50/50" partners in all their joint business dealings. Def. Dep., at pp. 23-24, 40-41, 47, 50, 62-63, 103, 125 (Nov. 19, 2018). This evidence will support the finding of a constructive or resulting trust. However, constructive and resulting trusts cannot be based on the unsupported testimony of a party. *Harris v. Smith*, 2020 WL 1893640, at \*4 (quoting *Gray v. Todd*, 819 S.W.2d 104, 109 (Tenn. Ct. App. 1991)). Therefore, the Plaintiff must establish a constructive or resulting trust with other evidentiary bases.

Rent statements, income and expense spreadsheets on investment properties, bank statements, and wire transfers of large sums of money support the inference that the Plaintiff and the Defendant owned investment properties together. Exhibits A1014, A1004, A1009-11, A1002; Exhibits A1031-35; Def. Dep., at pp. 24-25, 27-28, 30, 33, 37-38, 45, 61-62, 101-03, 105, 109 (Nov. 19, 2018). Checks and deposit receipts show that the Plaintiff paid the Defendant \$30,000 in 2001, \$11,064 in 2001, \$48,200 in two separate transfers in 2009, and \$3,693 in 2010. Def. Dep., at pp. 89-96 (Nov. 19, 2018). The purpose of these payments remains vague and not easily attributable to real estate, and throughout the deposition, even the Defendant is not certain of the reason for each transaction. Def. Dep., at pp. 89-92 (Nov. 19, 2018). He first admits that he does not know if he used the Plaintiff's money to purchase properties. Def. Dep., at p. 38 (Nov. 19, 2018). The Defendant then changes his story and avers the wire transfers were for other ventures in gold and in E-Trade. Def. Dep., at pp. 42-44, 82, 94-95, 97-98, 109, 125 (Nov. 19, 2018). He provided no documentation to show the wire transfers were for any other purpose than real estate. Def. Dep., at pp. 42-44, 82, 94-95, 97-98, 109, 125 (Nov. 19, 2018). The Defendant

also claims that the Plaintiff “gave away” his interest in the properties, citing the Plaintiff’s “silence” as his proof. Def. Dep., at p. 64 (Nov. 19, 2018).

The ambiguous nature of the wire transfers does not weigh in favor of a constructive or resulting trust, but it certainly demonstrates the Defendant’s unreliability as a witness to his transactions with the Plaintiff. The deposition and evidence demonstrate that both the Plaintiff and the Defendant conducted a lot of business together, and that they were partners in each venture. It is reasonable to infer that some of these transactions, especially the rent statements and the notarized document establish the Plaintiff as a joint owner of two properties.

The submitted documents and the Defendant’s testimony help establish the existence of a constructive trust. The Defendant arguably “acquire[d] property knowing that another is entitled to its benefits.” *Arnold*, 2005 WL 1488679, at \*6. The deeds to the properties in dispute are all in the Defendant’s name, even though the Defendant admits that the Plaintiff contributed to the property financially. Def. Dep., at pp. 24-25, 27-28, 30, 33, 37-38, 45, 101-02, 105, 109 (Nov. 19, 2018). Several documents demonstrate the Plaintiff obtained some interest in at least four properties listed in the Defendant’s name. For example, the Defendant prepared and notarized a document citing the Plaintiff as holding a sixty percent (60%) “majority share” interest in two properties on September 22, 2003. Exhibit A1001; Def. Dep., at pp. 36, 55 (Nov. 19, 2018). The document states that the Plaintiff paid \$45,750 towards the ownership of the two properties. Exhibit A1001; Def. Dep., at pp. 36, 55 (Nov. 19, 2018). The Defendant corroborated the notarized document by testifying at several points in his deposition that he and the Plaintiff owned several properties as partners. Def. Dep., at pp. 15, 23-24, 33, 62-63, 103 (Nov. 19, 2018). The Defendant notarized document, taken together with the rent statements and the multiple wire transfers, support the inference of a constructive trust.

Third, the Defendant “use[d] some relationship or influence to obtain legal title upon more advantageous terms than could be otherwise obtained.” *Arnold*, 2005 WL 1488679, at \*6. The Defendant testified that the Plaintiff was his “best friend,” that they were “together in everything,” and who have “always done business [together].” Def. Dep., at pp. 11, 13-14, 52-53, 125 (Nov. 19, 2018). His testimony detailed several other businesses the two engaged in, including stocks, joint e-Trade account, real estate in Thailand, gold, and jewelry. Def. Dep., at pp. 29, 41-44, 82, 90-91, 97-99, 125 (Nov. 19, 2018). A possible argument may be that the Defendant took advantage of the close relationship between him and the Plaintiff to obtain the investment properties they jointly owned. These statements by the Defendant in his deposition support establishing a resulting trust by showing his intention to share the properties with the Plaintiff. However, without more facts, there is not much evidence in the Defendant’s deposition testimony to support this argument.

Lastly, it is not likely that the court will impose a resulting trust. The facts of this case do not support that there was “a failure of an express trust or the purpose of such a trust” in which a court may impose this type of remedy. *Story*, 166 S.W.3d at 184. However, a court may consider the notarized document and payment as “a conveyance to one person on a consideration from another,” in favor of creating a resulting trust. Exhibit A100; *Story*, 166 S.W.3d at 184. However, the Defendant claimed that he sent the \$45,750 back to the Plaintiff. Def. Dep., at pp. 16, 25, 28, 31, 37, 40, 61 (Nov. 19, 2018). As evidence of his repayment, the Defendant stated that “since 2003, [the Plaintiff] never asked me for the money.” Def. Dep., at p. 40 (Nov. 19, 2018). The Defendant did not provide any other evidence of a repayment to the Plaintiff, despite his promise to do so. Def. Dep., Late-Filed Exhibit No. 2, No. 3, No. 4, pp. 92-94, 99-100 (Nov. 19, 2018).

This again contradicts the documentary evidence and further demonstrates the Defendant's unreliability as a witness to his transactions with the Plaintiff.

### **CONCLUSION**

For these reasons, under Tennessee law, the most likely remedy that a court will award is a constructive trust. The Defendant repeatedly admitted to owning real estate with the Plaintiff, and that the two were equal partners in all of their business dealings. The documentary evidence showing large wire transfers, income statements on investment properties, rent statements, and a notarized letter stating that the Plaintiff had a 60% interest in two properties support the finding of a constructive trust. It is not likely that the court will find sufficient support for a resulting trust. The supporting evidence for a resulting trust shows that the Defendant and the Plaintiff intended to conduct business as equal partners, and that the Plaintiff paid consideration for some of the properties. However, there is no evidence that the two intended to create an implied trust.

## WRITING SAMPLE

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The following writing sample is the final version of a trial brief to satisfy my writing requirement in my Appellate Advocacy class. An earlier draft of this sample was part of a larger trial brief written for the National Moot Court Competition in fall 2020.

This trial brief analyzes whether qualified immunity protects a public official that conducts a warrantless search of a business under the authority of a statute. Written for the government as the respondent, my trial brief argues that public officials are immune from liability when conducting administrative searches of businesses to prevent harm to public health.

## TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
1. The Problem of False Miracle Cures and the Government’s Response.....	2
2. The Romulus Board of Health Investigates Substandard Care at Medical Facilities.....	3
3. Procedural History.....	5
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	9
I. QUALIFIED IMMUNITY PROTECTS A PUBLIC OFFICIAL THAT ACTS IN RESPONSE TO A PANDEMIC BY ENFORCING A PRESUMPTIVELY VALID STATUTE THAT AUTHORIZED A WARRANTLESS SEARCH OF A HEALTH INSURANCE COMPANY.....	25
A. <i>A statutorily authorized search seeking relevant medical records from a health insurer to investigate dangerous treatment during an ongoing pandemic is constitutional.</i> .....	27
1. A statutorily authorized search of a health insurance company meets the requirements for a reasonable search of a closely regulated industry.....	28
a. Health insurance is a closely regulated industry because it is subject to extensive and specific regulations.....	29

b.	The warrantless search of Caesar meets the exception for closely regulated industries because the regulatory scheme is motivated by governmental interest, the search is essential to the regulatory scheme's purpose, and the statute provides an adequate warrant substitute.....	32
2.	The search of Caesar also falls within the administrative search exception because obtaining a warrant was impracticable, the purpose of the search was not criminal deterrence, and the search recipient had an opportunity for precompliance review.....	35
B.	<i>Qualified immunity bars a claim when the official's conduct did not violate clearly established law.....</i>	38
1.	Qualified immunity shields Cleopatra from liability because of the lack of clearly established Fourth Amendment law for closely regulated industries.....	40
2.	Cleopatra is immune from liability because there is not clearly established law for what constitutes sufficient precompliance review before a neutral decisionmaker.....	43
CONCLUSION .....		44
APPENDICES .....		A-1

## TABLE OF AUTHORITIES

### CASES:

#### United States Supreme Court:

<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011).....	27, 28
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	26, 27
<i>Brigham City, Utah v. Stuart</i> , 547 U.S. 398 (2006).....	10
<i>Camara v. Municipal Court of City and County of San Francisco</i> , 387 U.S. 523 (1967).....	22, 24, 25
<i>City of Los Angeles v. Patel</i> , 576 U.S. 409 (2015).....	10, 12, 13, 14, 15, 22, 23, 25, 26, 29, 30, 32
<i>Colonade Catering Corp. v. United States</i> , 397 U.S. 72 (1970).....	29
<i>District of Colombia v. Wesby</i> , 138 S. Ct. 577 (2018).....	26, 27, 30
<i>Donovan v. Dewey</i> , 452 U.S. 594 (1981).....	11, 13, 17, 18, 19, 29
<i>Donovan v. Lone Steer</i> , 464 U.S. 408 (1984).....	23
<i>Frank v. Maryland</i> , 359 U.S. 360 (1959).....	27
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	40
<i>Kisela v. Hughes</i> , 138 S. Ct. 1148 (2018).....	27
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	27
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307 (1978).....	12, 14
<i>Mullenix v. Luna</i> , 577 U.S. 7 (2015).....	27
<i>New York v. Burger</i> , 482 U.S. 691 (1987).....	10, 11, 12, 13, 14, 16, 18, 19, 24, 25, 29, 30
<i>Paul v. Virginia</i> , 75 U.S. 168 (1868).....	13
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009).....	10
<i>Plumhoff v. Rickard</i> , 572 U.S. 765 (2014).....	10
<i>See v. City of Seattle</i> , 387 U.S. 541 (1967).....	23

<i>Scott v. United States</i> , 436 U.S. 128 (1978).....	10
<i>United States v. Biswell</i> , 406 U.S. 311 (1972).....	19, 24
<i>United States v. Knights</i> , 534 U.S. 112 (2001).....	10
<i>United States v. Montoya de Hernandez</i> , 473 U.S. 531 (1985).....	10
<i>United States v. Southeastern Underwriters Ass’n</i> , 322 U.S. 533 (1944).....	13
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983).....	10
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977).....	16
<i>White v. Pauly</i> , 137 S. Ct. 548 (2017).....	27
<b>United States Courts of Appeals:</b>	
<i>Big Ridge, Inc., v. Fed. Mine Safety &amp; Health Review Comm’n</i> , 715 F.3d 631 (7th Cir. 2013).....	16
<i>Connecticut v. Crotty</i> , 346 F.3d 84 (2d Cir. 2003).....	28
<i>Free Speech Coal., Inc. v. AG United States</i> , 825 F.3d 149 (5th Cir. 2016).....	29
<i>Liberty Coins, LLC v. Goodman</i> , 880 F.3d 274 (6th Cir. 2018).....	29
<i>United States v. Blocker</i> , 104 F.3d 720 (5th Cir. 1997).....	29
<i>United States v. Schiffman</i> , 572 F.2d 1137 (5th Cir. 1978).....	29
<i>Zadeh v. Robinson</i> , 928 F.3d 457 (5th Cir. 2019).....	30
<b>Federal District Courts:</b>	
<i>Hignell v. City of New Orleans</i> , No. CV 19-13773, 2020 WL 4541478, at *5 (E.D. La. Aug. 6, 2020).....	23
<i>Melillo v. Brais</i> , No. 3:17-CV-520 (VAB), 2019 WL 1118091, at *11 (D. Conn. Mar. 11, 2019).....	23
<b>CONSTITUTIONAL PROVISIONS:</b>	
U.S. Const. amend. IV.....	11
<b>STATUTORY PROVISIONS:</b>	
29 U.S.C. § 1161.....	14

29 U.S.C. § 1162.....	30
29 U.S.C. § 1163.....	30
29 U.S.C. § 1164.....	30
29 U.S.C. § 1165.....	30
29 U.S.C. § 1166.....	30
29 U.S.C. § 1167.....	30
29 U.S.C. § 1168.....	30
42 U.S.C. § 300gg .....	14
42 U.S.C. § 300gg-1.....	14
42 U.S.C. § 300gg-2.....	14
42 U.S.C. § 300gg-3.....	14
42 U.S.C. § 300gg-4.....	14
42 U.S.C. § 300gg-5.....	14
42 U.S.C. § 300gg-15.....	2
42 U.S.C. § 1983.....	2, 6
42 U.S.C. § 18022.....	2, 14
42 U.S.C. § 18032.....	2, 14
PCL § 18.8.100.....	17
PCL § 18.8.890.....	17
PCL § 18.8.891(a).....	18, 19, 21, 28
PCL § 18.8.891(b).....	18, 19, 21, 25
PCL § 18.8.891(c).....	19
PCL § 18.8.891(e).....	25, 32
PCL § 18.8.891(f).....	20, 21, 31
Health Insurance Portability and Accountability Act (HIPAA), P. L. No. 104-191, 110 Stat. 1936 (1996) .....	15
 <b>OTHER MATERIALS:</b>	
45 C.F.R. § 164.512(b)(1)(i).....	15
45 C.F.R. § 164.512(e).....	16
Congressional Research Service, <i>Federal Requirements on Private Health Insurance Plans</i> , (2018) <a href="https://fas.org/sgp/crs/misc/R45146.pdf">https://fas.org/sgp/crs/misc/R45146.pdf</a> .....	20

### **CITATIONS TO THE OPINIONS BELOW**

The District Court of Romulus dismissed Cleopatra's motion to dismiss in its entirety. That opinion is reproduced on pages thirteen through twenty-seven of the record.

The United States Court of Appeals for the Fourteenth Circuit reversed the District Court's decision, granting Cleopatra's motion to dismiss in its entirety. That opinion is reproduced on pages twenty-eight through thirty-nine of the record.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The Emergency Miasmic Syndrome Act (EMSA) § 18.8.891 states, in most relevant part:

- (a) The Commissioner of the Board may authorize an administrative subpoena to any licensed Hospital, which may require the Hospital to: (1) admit personnel of the Board onto their premises to inspect for evidence that the facility is providing substandard care for Miasmic Syndrome; and (2) Provide such records or documents to the Board as the Board may in its discretion require in order to determine if the Hospital is providing substandard care for Miasmic Syndrome.
- (c) A subpoena issued under this section shall be no broader than is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome.
- (e) Upon petition by an entity which is the target of a subpoena under this section, the full Board shall review the subpoena and may amend or quash it, if the Board agrees to do so by majority vote. No entity that so petitions will be penalized for its refusal, during the pendency of its petition, to comply with a subpoena under this section. During the pendency of any such petition, the entity will preserve all evidence as is sought by the

subpoena. Failure to preserve such evidence may constitute Obstruction of Justice.

- (f) The Board shall only issue a subpoena under this section: (1) Upon reasonable suspicion that the Hospital about which information is sought may be providing substandard care for Miasmic Syndrome; or (2) to a licensed Hospital at random, as part of a documented and fair methodology for conducting random inspections.

The Appendices also list the relevant statutes and constitutional authorities.

Appendix A contains the Romulus Consolidated Law. Appendix B contains the subpoena issued by Cleopatra in her position as Commissioner of the Romulus Board of Health. Appendix C contains the statute governing civil RICO claims, 18 U.S.C. § 1964(c), Public Health and Welfare statutes, 42 U.S.C. §§ 300gg-15, 18022, and 18032, and the statute governing civil rights actions, 42 U.S.C. § 1983. Appendix D contains the Fourth Amendment of the United States Constitution. Appendix E contains section 164.512(b) of the Code of Federal Regulations. Appendix F contains section 164.512(e) of the Code of Federal Regulations.

### **STATEMENT OF THE CASE**

A pandemic turns the world on its head. Life cannot return to normal until the healthcare industry develops an effective treatment. A sluggish response can lead to thousands of lives lost. Drug manufacturers face pressure to quickly develop an effective drug to combat the pandemic. The government has an obligation to protect the public from unproven treatments hastily prescribed in lieu of other options. Miasmic Syndrome is an ongoing pandemic that continues to disrupt the United States and the state of Romulus. R. at 1. The disease is highly contagious, has

infected millions, and has no known cure. R. at 1. The state of Romulus enacted the Emergency Miasmic Syndrome Act (EMSA) in response to these dangerous “miracle” treatments that threatened public health. This case considers whether a public official is immune from liability for enforcing a presumptively valid statute which authorized the search of a health insurance company to prevent a drug from causing future harm.

1. The Problem of False Miracle Cures and the Government’s Response

Livia Cleopatra serves as the Commissioner of the Romulus Board of Health and is the sole proprietor of Galen Research, a small pharmaceutical company. R. at 1. Shortly after the pandemic began, Galen conducted clinical trials to test whether Glukoriza, an FDA-approved cancer medication, was an effective treatment for Miasmic Syndrome. R. at 1. The trials showed Glukoriza was an effective Miasmic Syndrome treatment. R. at 1. Galen marketed the drug to physicians and health insurance companies, urging them to prescribe and cover Glukoriza as a treatment for the disease. R. at 2.

Galen successfully marketed the drug to Julius-Caesar Health System, who agreed to make the drug a preferred treatment for Miasmic Syndrome. R. at 2. Julius, a major healthcare provider, and Caesar, a health insurance company, operate as an integrated payor-provider. R. at 2. Julius providers ordered over 10,000 prescriptions for Glukoriza within four months of making it a preferred treatment. R. at 3. Julius’s researchers used this data set to investigate Glukoriza’s safety and efficacy and found that it caused serious kidney damage and

did not relieve Miasmic Syndrome symptoms. R. at 3. Julius recommended its providers stop prescribing the “miracle drug,” and Caesar removed Glukoriza from its formulary and stopped covering prescriptions. R. at 3. A whistleblower report later showed the Glukoriza trial conducted by Galen researchers falsified data and discharged patients showing signs of kidney damage before the symptoms could be confirmed. The reports did not suggest Cleopatra knew about Galen’s falsifications, and the report even showed active attempts to hide the falsifications from her. R. at 5.

Several drugs like Glukoriza promising a miracle cure for Miasmic Syndrome had entered the market in the scramble to find a cure. R. at 3. The Romulus legislature moved quickly in response to pass the Emergency Miasmic Syndrome Act. R. at 3. The EMSA identified the Board’s primary responsibility to be “the safeguarding of the Public Health.” R. at 8. The Act granted the Board of Health authority to investigate suspect medical facilities, where it would “especially focus on the control and elimination of contagious disease within the state.” R. at 4, 8. The EMSA allowed the “Commissioner of the Board [to] authorize an administrative subpoena to any hospital . . . or any other person or entity within the state” to determine whether dangerous treatments harmed patients. R. at 9. The administrative subpoenas would require a hospital or entity to “admit personnel of the Board onto their premises,” and “provide such records or documents to the Board” that it requests to determine if a facility is providing substandard care. R. at 9. The EMSA limited the subpoenas by requiring that they “be no broader than

is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome.” R. at 9. The Act also offered search recipients the opportunity to challenge the subpoena which “the full Board shall review,” and emphasized that “[n]o entity that so petitions will be penalized for its refusal[ ] during the pendency of its petition.” R. at 9.

## 2. The Romulus Board of Health Investigates Substandard Care at Medical Facilities

Cleopatra, under EMSA’s authority as the Board’s Commissioner, began to investigate medical facilities. R. at 4. Cleopatra received reports of the shocking health outcomes at Julius and launched an investigation. R. at 4. Cleopatra drafted subpoenas seeking Miasmic Syndrome patients’ medical records from both companies. R. at 4. Cleopatra instructed Board officials to secure compliance to prevent the recipients from hiding evidence. R. at 12.

Two groups of Board officials executed the subpoenas at Julius and Caesar six days after drafting the subpoenas. R. at 4, 12. Julius’s staff refused to comply with the subpoena and demanded a hearing to challenge its validity. R. at 4, 18. The Board’s agents left Julius without searching for or collecting any records. R. at 4. Caesar’s staff turned over documents after Board officials informed them that their refusal to comply could result in subsequent legal action. R. at 4. The subpoena sought documents relevant only to Miasmic Syndrome care. But, when Caesar’s staff could not locate the appropriate records, inspecting officers required Caesar to provide all records since the start of the pandemic. R. at 5.

The search proved fruitful. Documents found at Caesar evidenced frequent incidents of kidney failure in Miasmic Syndrome patients treated at Julius. R. at 5. The Board voted to suspend Julius's operating license based on its finding that Julius provided substandard treatment for Miasmic Syndrome patients. R. at 5. During the two weeks of its license suspension, over 15,000 patients dropped out of the Julius-Caesar health system. R. at 5. Julius then offered evidence to the Board that the Glukoriza prescriptions wholly accounted for its poor patient outcomes, and the Board restored Julius's operating license. R. at 6.

### 3. Procedural History

Caesar filed suit against Cleopatra alleging a 42 U.S.C. § 1983 civil rights claim based on the subpoena issued by her as Board Commissioner. R. at 6. Cleopatra filed a 12(b)(6) motion to dismiss both claims and the district court denied the motion in its entirety. R. at 6. Cleopatra appealed to the Fourteenth Circuit. R. at 7. The Fourteenth Circuit reversed the district court and ordered it to grant Cleopatra's motion in its entirety. R. at 7. The Fourteenth Circuit held that qualified immunity barred the section 1983 claim because the search was objectively reasonable based on the novel factual circumstances and lack of clearly established law. R. at 38. Caesar petitioned this Court for a writ of certiorari and this Court granted the petition. R. at 7.

### SUMMARY OF THE ARGUMENT

The Fourth Amendment's broad protection against unreasonable search and seizure is subject to exceptions, and in some circumstances, a search is reasonable even when conducted without a warrant. One of these exceptions involves closely regulated industries, which reflects the government's interest in regulating certain types of businesses. Some businesses engage in such closely regulated industries that they have a reduced expectation of privacy and know that they may be subject to warrantless inspection. Extensive regulations have long shaped how the health insurance industry conducts business, and as a health insurer, Caesar has a reduced expectation of privacy in its records. The warrantless search must still meet three requirements to be reasonable under the Fourth Amendment. The most relevant requirement is that the regulatory statute authorizing the search must provide a constitutionally adequate substitute for a warrant. It was reasonable for Cleopatra to search Caesar because the statute giving her authority to issue the subpoena performed the two basic functions of a warrant. The EMSA, which authorized the search of Caesar, sets out the scope of the inspection, places health care facilities on notice regarding sufficient compliance with the statute, and informs the healthcare facility who may conduct the inspection. The statute provides a constitutionally adequate substitute for a warrant. The search of Caesar did not violate the closely regulated standard under the Fourth Amendment.

The search was also constitutional under the exception for general administrative searches. The search is constitutional as long as the targeted party has an

opportunity to challenge the search before a neutral decisionmaker prior to complying with the search. Warrantless administrative searches are constitutional when they meet certain requirements. The key requirement here is the need for an opportunity for precompliance review before a neutral decisionmaker. The EMSA expressly allows subpoena recipients to petition the search before the Romulus Board of Health. Recipients may seek review of the subpoena without fear of penalty. The recourse to the Board constitutes a sufficient opportunity for precompliance review.

Qualified immunity protects public officials from liability unless they are plainly incompetent or knowingly violate the law. Qualified immunity bars section 1983 claims unless the plaintiff sufficiently alleges: (1) that the defendant violated a constitutional right, and (2) that the defendant's conduct was objectively unreasonable in light of clearly established law at the time of the offense. The standard is demanding – the law must be well established by binding precedent that clearly prohibits the official's conduct. If either point cannot be sufficiently alleged, the claim is fatally flawed.

Even if this Court identifies some constitutional violation, the claim fails under the second prong of the qualified immunity analysis. Whether a health insurance qualifies as a closely regulated industry is not clearly established law. No federal court has analyzed the issue, nor would the law clearly prohibit Cleopatra's conduct. Courts have found industries such as the horse racing and wagering industry, fishing industry, and taxidermy industry to be closely regulated. A reasonable official could conclude the health insurance industry is too.

What constitutes sufficient precompliance review for administrative searches is also not clearly established. The administrative exception requires precompliance review before a neutral decisionmaker, and this Court has never defined the exact form it should take. An official cannot predict how a court will define adequate precompliance review. A reasonable official could conclude the opportunity to challenge the subpoena before the Board was well within the standard.

Qualified immunity protects Cleopatra from liability. This Court should find that this search did not violate the Fourth Amendment. Even if this Court identifies some constitutional violation, it should hold that the search was objectively reasonable in light of clearly established law. Because Caesar's claim fails both prongs of qualified immunity, this Court should affirm its dismissal.

### **ARGUMENT**

#### **I. QUALIFIED IMMUNITY PROTECTS A PUBLIC OFFICIAL THAT ACTS IN RESPONSE TO A PANDEMIC BY ENFORCING A PRESUMPTIVELY VALID STATUTE THAT AUTHORIZED A WARRANTLESS SEARCH OF A HEALTH INSURANCE COMPANY**

Government officials must be able to respond to emergencies that threaten public health, especially when the state legislature enacts laws authorizing them to do so. Officials better serve the public when they are undeterred from fulfilling their duties. Facially valid laws are virtually unenforceable if officials are reluctant to impose them for fear of being subject to liability in the future. This case arises from a plethora of unknown variables and newly enacted law. It highlights the need for officials to have confidence in carrying out their duties when confronted with a crisis.

Officials should not be forced to choose between abandoning their duties or being subject to liability.

This case involves a presumptively valid statute authorizing a public official to search a health insurance company for medical records in response to a novel pandemic. A search is “reasonable” under the Fourth Amendment so long as “the circumstances, viewed objectively, justify that action.” *Scott v. United States*, 436 U.S. 128, 138 (1978). Reasonableness is a fact-driven analysis that looks to balance the degree of intrusion on a party’s privacy interests against the degree of the search’s necessity to promote governmental interests. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)); *see also United States v. Knights*, 534 U.S. 112, 118-19 (2001). There are circumstances where governmental interest is so heightened that an exception to the Fourth Amendment’s warrant requirement is reasonable. *See Brigham City*, 547 U.S. at 403 (citation omitted). One of these exceptions involves closely regulated industries, and the other applies to general administrative searches. *City of Los Angeles v. Patel*, 576 U.S. 409, 424-25; *New York v. Burger*, 482 U.S. 691, 702 (1987). A search executed within these exceptions is constitutional, but it is not clear how these exceptions apply to the circumstances of this case.

A public official that conducts an administrative search of a closely regulated industry can be subject to suit if she violates a constitutional (or federal statutory) right. Even if a violation occurs, the official is not liable for damages if she is entitled to immunity. The doctrine of qualified immunity applies unless (1) the official

violated a constitutional right, and, if so, (2) the right was clearly established so that “any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). If the plaintiff fails to sufficiently allege either prong, the claim fails. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The violation alleged here is based on the Fourth Amendment protection against unreasonable search and seizure. *See* U.S. Const. amend. IV.

This Court should find that Cleopatra did not violate Caesar’s Fourth Amendment rights when she authorized a search of their premises. The EMSA authorized Cleopatra to search Caesar, and she took prompt action in response to an emergency to protect public health. R. at 4. Cleopatra’s conduct was reasonable and the search she authorized was constitutional. Even if this Court finds some constitutional violation, however, Cleopatra is not subject to liability. The doctrine of qualified immunity shields her because there is not established law that clearly prohibited her conduct.

*A. A statutorily authorized search seeking relevant medical records from a health insurer to investigate dangerous treatment during an ongoing pandemic is constitutional.*

A private business can be subject to warrantless searches if it engages in a closely regulated industry, or if the search is administrative. Voluntarily engaging in a pervasively regulated industry puts the business on notice of warrantless investigations. *See Burger*, 482 U.S. at 705 n.16 (citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). A search under the closely regulated industry exception is reasonable where government interests inform the regulatory scheme that permits

warrantless searches of private businesses. *Id.* at 702-03. The search is only reasonable if it furthers the regulatory scheme's purpose, and the subpoena authorizing the search must retain the two primary functions of a warrant. *Id.* Closely regulated businesses are subject to warrantless searches but only where substantial government interest requires them and where there is a constitutionally adequate substitute for a warrant.

General administrative searches are constitutional when executed without a warrant, but there must be an opportunity for the targeted party to challenge the search before compliance. *Patel*, 567 U.S. at 420. The standard for administrative searches requires circumstances outside of deterring crimes that make the warrant requirement unreasonable. *Id.* Unlike the exception for closely regulated industries, the exception for administrative searches does not require a warrant substitute. *Id.* Instead the subject of the search need only be able to challenge the inspection before a neutral decisionmaker and prior to compliance. *Id.*

A statutorily authorized search that provides an adequate warrant substitute and an opportunity for precompliance review is constitutional under the Fourth Amendment's reasonableness standard. There was no need for Cleopatra to obtain a warrant because the search meets two exceptions to the Fourth Amendment's warrant requirement.

1. A statutorily authorized search of a health insurance company meets the requirements for a reasonable search of a closely regulated industry.

The Fourth Amendment's warrant requirement has "lessened application" where a business engages in a closely regulated industry because the business has a "reduced expectation of privacy." *Burger*, 482 U.S. at 702; see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). A closely regulated industry has reduced privacy interests because the government has a heightened interest in regulating that industry. See *Burger*, 482 U.S. at 702. Courts consider several factors when analyzing whether an industry is closely regulated. The factors demonstrate a business's privacy interests were weakened such that it "could not help but be aware" it was subject to warrantless search. *Burger*, 482 U.S. at 703 (quoting *Dewey*, 452 U.S. at 600). The court will consider the "pervasiveness and regularity" of the regulations governing the industry, the "duration of a particular regulatory scheme," and whether other jurisdictions have imposed similarly extensive regulatory requirements to determine if an industry is closely regulated. *Id.* at 701, 705; *Dewey*, 452 U.S. at 606. Also considered is whether the industry presents a "clear and significant risk to the public welfare" and whether the regulations are industry-specific. *Patel*, 576 U.S. at 424-25.

- a. Health insurance is a closely regulated industry because it is subject to extensive and specific regulations.

The government has long subjected health insurance companies to strict regulation and enforcement regimes. States have regulated insurance dating back to the eighteenth century. See *Paul v. Virginia*, 75 U.S. 168, 168-69 (1868) (addressing

the scope of federal control over insurance) (overruled in part by *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944)). All fifty states require health insurers to be licensed and every state has a health insurance regulatory scheme in place.<sup>1</sup> Federal statutes establish requirements regarding the development of premiums, coverage of health care providers, how insurers provide and maintain coverage, mandatory covered services, and patient protection standards. *See, e.g.*, 42 U.S.C. §§ 300gg to gg-5, 15, 18022, 18032; 29 U.S.C. §§ 1161-68. This regulation far surpasses that of automobile junkyards, which the Court recognized as closely regulated based, in part, on a licensing and registration requirement, a recordkeeping requirement, and a requirement to display the registration number. *See Burger*, 482 U.S. at 704.

Health insurance is subject to industry-specific regulations. This Court has analyzed six cases under the Fourth Amendment closely regulated industry standard. This Court deemed two industries not closely regulated, largely based on the fact that the regulations in question applied to nearly all businesses. *See Patel*, 576 U.S. at 424-25; *see also Barlow's Inc.*, 436 U.S. at 313. If this Court recognized such generally applicable regulations as sufficient to constitute a closely regulated industry, the exception would swallow the rule. *See Patel*, 576 U.S. at 425. That is not the case here. The regulations overseeing health insurance companies are specific to health insurance companies. They do not apply to other businesses. They are certainly not

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<sup>1</sup> Congressional Research Service, *Federal Requirements on Private Health Insurance Plans*, (2018) <https://fas.org/sgp/crs/misc/R45146.pdf>.

as broad as the OSHA regulations deemed insufficient by this Court in *Marshall v. Barlow's Inc.*, where the Court found that the electrical and plumbing industry was not closely regulated. *See Barlow's Inc.*, 436 U.S. at 313-14. There, the Court held that the closely regulated exception did not apply to the electric and plumbing industry because the OSHA regulations applied to *every* business engaged in interstate commerce. *Id.* The Court in *Patel* determined that the basic licensing requirement, sanitary regulations, and tax collection regulations did not make the hotel industry closely regulated because the regulations were too broad and applied to nearly all businesses. *Patel*, 576 U.S. at 425. The regulations at issue are specific to health insurance and present no risk of swallowing the rule.

Poor administration of health insurance can present a “clear and significant risk to the public welfare. *Patel*, 576 U.S. at 424-25. Health insurance companies dictate where patients receive treatment, what treatments are available, and what persons can obtain coverage. The health insurance industry needs extensive regulations because it can determine a person’s access to medical care, and without close regulation, mismanagement of the industry can pose a clear risk to public welfare. The Court noted that the operation of hotels did not pose a risk to public welfare, unlike those posed by liquor sales, firearms dealing, mining, or operating automobile junkyard. *See id.* Health insurance coverage, in contrast, has a direct impact on the public welfare.

Health insurance companies cannot use medical privacy safeguards to counteract its reduced expectation of privacy as a part of a closely regulated industry.

Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) “to simplify the administration of health insurance.” Health Insurance Portability and Accountability Act (HIPAA), P. L. No. 104-191, 110 Stat. 1936 (1996). HIPAA established national standards to protect medical records, but it also expressly allows government officials “authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability” to recover protected records. 45 C.F.R. § 164.512(b)(1)(i). HIPAA also requires health insurers to disclose medical records in “*any* . . . administrative proceeding . . . in response to a subpoena.” 45 C.F.R. § 164.512(e) (emphasis added). The disclosure of medical records between physicians, hospitals, insurance companies, and public health agencies are “an essential part of modern medical practice.” *Whalen v. Roe*, 429 U.S. 589, 602 (1977). This Court recognizes that disclosure to public health officials does not automatically constitute an unreasonable invasion of privacy because government officials have a “responsibility for the health of the community.” *Id.* The Seventh Circuit relied on this language in recognizing that, in certain contexts, there may be substantial need for government officials to access medical records held by a third party. *See Big Ridge, Inc., v. Fed. Mine Safety & Health Review Comm’n*, 715 F.3d 631, 649 (7th Cir. 2013). A statute that expressly grants government officials access to medical records supports the reasonableness of the search. *Id.* Health insurers have a reduced expectation of privacy in their records and have long been subject to pervasive regulation. The government has an especially high interest in records

relevant to preventing or controlling a pandemic. Health insurance is a closely regulated industry.

- b. The warrantless search of Caesar meets the exception for closely regulated industries because the regulatory scheme is motivated by governmental interest, the search is essential to the regulatory scheme's purpose, and the statute provides an adequate warrant substitute.

A closely regulated business is not vulnerable to any warrantless search—only those that meet three criteria for reasonableness. *See Burger*, 482 U.S. at 702. A warrantless search of a closely regulated industry is reasonable where: (1) there is substantial governmental interest that informs the regulatory scheme; (2) the search furthers the regulatory scheme; and (3) the subpoena provides an adequate substitute for a warrant. *Id.* at 702-03 (citing *Dewey*, 452 U.S. at 600). The search Cleopatra authorized meets all three criteria.

First, there is a substantial governmental interest that informs the regulatory scheme. The government's interest is especially high because an ongoing pandemic threatened lives. R. at 1. The EMSA is necessary to protect the public from poor treatment for a highly contagious, potentially fatal virus. R. at 1. The Board had an obligation to safeguard public health and investigate substandard care provided to Miasmic Syndrome patients. *See* PCL §§ 18.8.100, 18.8.890. In the absence of government action, patients were exposed to dangerous treatments like Glukoriza. R. at 5. A business in a formal partnership with the largest healthcare provider in Romulus has a direct impact on public health, especially when Julius-Caesar administers treatment for the viral disease. The “notably worse health outcomes” and

ineffective treatments negatively impacted public health, prompting the legislature to enact the EMSA in response. R. at 4. The government undoubtedly possesses a substantial interest in the EMSA regulatory scheme.

Second, the inspection and enforcement provisions of the EMSA are necessary to further the Act's regulatory scheme. The primary responsibility of the Board is to protect public health. *See* PCL § 18.8.100. The Board must be able to investigate and act upon threats to the public health. If the Board cannot access relevant medical records the EMSA is effectively useless. Only active government regulation can properly address the issue of dangerous "miracle drugs." The EMSA's inspection and enforcement provisions are crucial to protect public health.

Third, the subpoena Cleopatra authorized is a constitutionally adequate substitute for a warrant. A warrant substitute must fulfill the two basic functions of a warrant: (1) it must advise that the search is being made pursuant to the law; and (2) have a properly defined scope to limit the discretion of the inspecting officers. *See Burger*, 482 U.S. at 703. A statute meets the first requirement when it is "sufficiently comprehensive" such that the recipient has reason to know it would be subject to periodic search. *Id.* (citing *Dewey*, 452 U.S. at 600). To satisfy the second function, the statutory scheme must "limit the discretion of inspecting officers." *Id.* The subpoena Cleopatra authorized serves both of these functions.

The EMSA is sufficiently comprehensive such that Caesar had reason to know it would be subject to periodic search. The EMSA informs hospitals, and entities housing relevant documents about hospitals, that they are subject to search. *See* PCL

§ 18.8.891(a)-(b). The statute explicitly states that the Board “may authorize an administrative subpoena to any other person or entity within the State . . . to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome.” RCL § 18.8.891(b). Caesar is a health insurance company in a formal partnership with Julius, a licensed hospital, in the state of Romulus. R. at 2. Caesar houses insurance and medical records related to patients receiving care at Julius, including patients receiving treatment for Miasmic Syndrome. R. at 5. Caesar therefore knew or had reason to know that it was subject to search under the EMSA. The EMSA also notifies Caesar that only Board officials are authorized to conduct a search and that compliance requires permitting Board officials to inspect the premises and provide the relevant records being sought. *See* PCL §§ 18.8.891(a)-(b). This notified Caesar about how to comply with the EMSA and informed Caesar “who is authorized to conduct an inspection.” *Burger*, 482 U.S. at 711. Caesar could “not help but be aware” that it was subject to inspection undertaken to retrieve relevant records pertaining to the care of Miasmic Syndrome patients. *Id.* at 703 (quoting *Dewey*, 452 U.S. at 600).

The subpoena also clearly specified the statute from which it derived its authority, and inspecting officers provided a copy to Caesar. R. at 11. The subpoena expressly stated its purpose: “conducting an inspection and search for information relevant to potential negligent or substandard care for Miasmic Syndrome.” R. at 11. Looking to the cited statute in the subpoena shows the limitations on the Board’s authority to issue a subpoena under the EMSA. RCL § 18.8.891(c). Not only does the

subpoena cite the relevant statute articulating the purpose of the search, but the subpoena itself also reiterates its clear purpose and authority.

The EMSA's search provisions are narrowly tailored to impose restraints upon the inspecting officer's discretion. A statute authorizing the search of a closely regulated industry must be "carefully limited in time, place, and scope." *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)). The EMSA limits the scope of a search only to what is "reasonably required to determine whether a [h]ospital is providing substandard care for Miasmic Syndrome." PCL § 18.8.891(c). The EMSA imposes additional restraint on the inspecting officer's discretion because a subpoena may only be issued upon "reasonable suspicion" a hospital is providing substandard treatment for Miasmic Syndrome or pursuant to a documented and fair methodology for conducting random inspections." PCL § 18.8.891(f). Neither Cleopatra or the EMSA authorized inspecting officers to be armed or to retrieve data outside of the scope of the subpoena. The fact that inspecting officers acted outside of the scope of the subpoena was not a result of Cleopatra's actions or the EMSA's search provisions. The EMSA's search provisions were specific and imposed narrow restraints on inspecting officers, despite their failure to abide by them.

The subpoena specified that it only sought records limited to a certain time frame and subject matter. It only sought records that were "1) related to the diagnosis and/or treatment of Miasmic Syndrome, or 2) related to patients who are suspected of carrying Miasmic Syndrome." R. at 11. The subpoena provided an even narrower focus because it only requested documents "dated on or after May 1, 2019." R. at 11.

The district court used language out of context when it asserted that the instant subpoena sought “all records related to medical care at Julius Health Center.” Opinion of the District Court of Romulus, R. at 24. The subpoena text immediately following the quoted language expressly limits the search by specifying that *only* the records related to the care of Miasmic Syndrome patients at Julius are sought. R. at 11. Nowhere on the subpoena did Cleopatra request the extent of data ultimately turned over by Caesar’s employees, and any records retrieved outside of the subpoena’s specific scope is the result of employee error. R. at 5, 11. Inspecting officers demanded that all data be handed over from the beginning of the pandemic, but the subpoena only authorized data related to Miasmic Syndrome patients. The district court properly noted that even though the Board’s agents retrieved data that exceeded the scope authorized by the subpoena, it does not evidence that the subpoena itself was overly broad. *See* Opinion of the District Court of Romulus, R. at 24. The language of the subpoena is the direct result of Cleopatra’s actions. That inspecting officers acted independently outside of those orders does not render Cleopatra’s actions in authorizing the subpoena unconstitutional. The subpoena that Cleopatra drafted was an adequate substitute for a warrant because it limited inspecting officers, despite their acting outside of its scope. Cleopatra expressly limited the search to data related to the Miasmic Syndrome. R. at 11. Cleopatra needed to search the business to protect the public and limited the search to that purpose only.

The EMSA also placed appropriate limitations on inspecting officers' discretion. A subpoena can only be issued by the Board of Health upon reasonable suspicion or according to a random, documented, and fair methodology. RCL § 18.8.891(f). Thus, the inspecting officers have no discretion in the subpoena's execution. The purpose of subpoenas authorized by the EMSA address one specific issue: whether a hospital is providing substandard care for Miasmic Syndrome. RCL 18.8.891(a). The EMSA limits the discretion of inspecting officers because it issues subpoenas that are "no broader than reasonably required" to investigate on specific issue and inspecting officers have no discretion in its enforcement. RCL 18.8.891(b).

This Court should find that the search of Caesar was constitutional under the Fourth Amendment closely regulated industry standard. Caesar is a closely regulated industry with a reduced expectation of privacy. The search of Caesar fulfilled the requisite criteria to constitute a reasonable search under the Fourth Amendment. Caesar failed to sufficiently allege a constitutional violation and its claim should be barred.

2. The search of Caesar also falls within the administrative search exception because obtaining a warrant was impracticable, the purpose of the search was not criminal deterrence, and the search recipient had an opportunity for precompliance review.

A business that is not a part of a closely regulated industry can still be subject to a warrantless administrative search. This Court analyzes the constitutionality of such searches under the "general administrative doctrine" as opposed to the "more relaxed" closely regulated standard. *Patel*, 576 U.S. at 424. Search recipients under this exception have additional protections because the recipient does not engage in a

closely regulated industry and there is no notice that it may be subject to search. *See id.* The search is reasonable when: (1) there is a “special need[ ], beyond the normal need for law enforcement, [which] makes the warrant requirement impracticable”; (2) the purpose of the search is not crime deterrence; (3) and the targeted party is offered an avenue of “precompliance review before a neutral decisionmaker.” *Id.*

There is no set definition that the form an opportunity for precompliance review must take. Relevant to the analysis is whether the right to review may be invoked without criminal penalty and whether the precompliance review acts as a check on the issuing officer to reduce the risk of harassment. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533 (1967); *see also Patel*, 576 U.S. at 423. Although a neutral decisionmaker typically implies a judicial entity, review before a non-judicial entity may fulfill the purpose of the precompliance review requirement by sufficiently altering the dynamic between the issuing party and the recipient. This Court in *Patel* considered an administrative law judge to be a sufficiently neutral decisionmaker. *Id.* at 422-23. This Court has also acknowledged district courts or “judicial review” to be sufficient. *See See v. City of Seattle*, 387 U.S. 541, 545 (1967); *see generally Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984). The Sixth circuit has recognized that a neutral decision maker may be a hearing officer appointed by a city mayor. *Benjamin as Tr. of Rebekah C. Benjamin Tr. v. Stemple*, 915 F.3d 1066, 1070 (6th Cir. 2019). Other district courts have also held that reviews by officers appointed by a city mayor meet this requirement, as well as reviews by Boards of Zoning. *See e.g., Hignell v. City of New*

Orleans, No. CV 19-13773, 2020 WL 4541478, at \*5 (E.D. La. Aug. 6, 2020); Melillo v. Brais, No. 3:17-CV-520 (VAB), 2019 WL 1118091, at \*11 (D. Conn. Mar. 11, 2019). It is not clear what exact form of precompliance review must take or what is considered to be a neutral decisionmaker.

First, the circumstances surrounding the search of Caesar rendered the warrant requirement impracticable. The Board had a “special need” to respond to an emergency threatening the public health by issuing a subpoena to search Caesar. To avoid the concealment of evidence, the Board determined that the element of surprise would be the most effective way to retrieve information. R. at 12. This Court recognizes that “if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential . . . surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.” *Biswell*, 406 U.S. at 316. The investigation of Caesar was not for the purpose of criminal enforcement. There was no requirement that the Board must make a showing beyond a reasonable doubt to impose penalties for noncompliance with the EMSA. *See* PCL § 18.8.891(d). As the district court properly noted, it would be impracticable to require the Board to obtain a warrant to protect the needs of public health. Opinion of the Romulus District Court of Romulus, R. at 20. Cleopatra acted in response to a pandemic that affected millions and quick action was necessary to prevent other patients from receiving the dangerous and ineffective “miracle” treatment. R. at 14. Search by subpoena was sufficient—there was no need for the

Board to seek a warrant before it could investigate a potential threat to the public health.

Second, the purpose of searching Caesar was not criminal deterrence. This Court recognizes the reasonableness of warrantless searches executed without individualized suspicion of wrongdoing. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). *See e.g., Burger*, 482 U.S. 702–04; *Michigan v. Tyler*, 436 U.S. 499, 507–09 (1978) (administrative inspection of fire-damaged premises to determine cause of blaze); *Camara*, 387 U.S. at 534-39 (administrative inspection to ensure compliance with city housing code). This Court also rejects that there must be a finding of probable cause before executing administrative searches. *Camara*, 387 U.S. at 539 (“if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant”); *Barlow’s Inc.*, 436 U.S. at 320 (“probable cause in the criminal law sense is not required”); *Burger*, 482 U.S. at 700. The Board has a responsibility to protect public health, not to deter criminal activity. The Board’s means of bringing parties into compliance are civil in nature. *See* PCL § 18.8.891(d). The purpose of the search was to protect the public health, “and city after city has seen this need [for preventative action] and granted the power of inspection to health officials.” *Frank v. Maryland*, 359 U.S. 360, 372 (1959) (overruled on other grounds by *Camara*, 387 U.S. at 523). The search against Caesar was to investigate substandard treatment of Miasmic Syndrome patients, not to deter criminal activity.

Third, the statute authorizing the search afforded Caesar an opportunity for precompliance review before a neutral decisionmaker. This is not a case where the statute provided no opportunity for precompliance review whatsoever. *See Patel*, 576 U.S. at 421. The EMSA afforded the subject of a search to review the subpoena before the full eleven-member Board *without penalty*. *See* PCL § 18.8.891. No court has ever found that review by such a board does not meet the *Patel* standard. There is no evidence in the record that establishes that the Board is not a neutral decisionmaker.

The EMSA put Caesar on notice of the opportunity to challenge the subpoena, although the subpoena itself did not highlight the right to appeal and inspecting officers did not explicitly notify Caesar. *See* PCL § 18.8.891(b)-(e). The district court makes much of the fact that there is no entity to serve as a check on the Board even while acknowledging that the full Board serves as a check on Cleopatra. Opinion of the District Court of Romulus, R. at 21. However, it also acknowledges that “neither EMSA nor any other part of the Board of Health’s enabling legislation appear to grant Board agents the authority to make arrests.” *Id.* at 21-22. Unlike *Patel*, the inspecting officers were not law enforcement and did not have the authority to arrest anyone. *Patel*, 576 U.S. at 421. Cleopatra never authorized inspecting officers to threaten Caesar employees with immediate arrest, and thus Caesar’s employees were not in fact subject to immediate arrest. Further, the opportunity for precompliance review is a “minimal requirement” that does not necessitate *multiple* levels of review. *Patel*, 576 U.S. at 420. Cleopatra was not acting under unchecked discretionary

authority. Rather, the right to review the subpoena before the full Board altered the dynamic between Caesar and Cleopatra by serving as a check on her authority. Caesar failing to invoke this right does not render the search unconstitutional.

B. *Qualified immunity bars a claim when the official's conduct did not violate clearly established law.*

Qualified immunity protects Cleopatra from liability because her conduct did not violate Caesar's Fourth Amendment rights. Even if her conduct was unreasonable, the unlawfulness of her conduct was not clearly established at the time. A section 1983 claim fails the second prong of qualified immunity when the conduct of the defendant was objectively reasonable in light of clearly established law. *See Wesby*, 138 S. Ct. at 589. The question of qualified immunity "should be resolved at the earliest possible stage of a litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow v. Fitzgerald*, 475 U.S. at 818). When "clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Harlow*, 475 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

When plaintiffs allege an official violated their rights, "specificity is especially important in the Fourth Amendment context." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Mullinix*, 577 U.S. at 7). Fourth Amendment inquiries are context and fact dependent, but existing law must place the constitutionality of the official's conduct beyond debate. *See Wesby*, 138 S. Ct. at 590; *see also Mullinix*, 577 U.S. at 12. The law must be "particularized to the facts of the case," and the violation cannot be alleged with a high level of generality, though a

“case directly on point” is not required. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Anderson*, 483 U.S. at 640); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). This Court has criticized decisions that find qualified immunity improper based on general Fourth Amendment precedent without identifying factually similar cases. *See White*, 137 S. Ct. at 552 (noting that the general precedents relied on by the lower court did not “by themselves create clearly established law outside an obvious case”).

Qualified immunity is a broad shield that protects all but the “plainly incompetent or those who knowingly violate the law.” *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). This high standard gives “government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Public officials acting to enforce a presumptively valid statute is reasonable because officials must enforce laws until and unless deemed unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979); *see Connecticut v. Crotty*, 346 F.3d 84, 102 (2d Cir. 2003). Further, vicarious liability does not apply to section 1983 claims, and “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Cleopatra’s role as the Board’s Commissioner required her to enforce the EMSA to protect the public. *See RCL* § 18.8.891(a). Cleopatra is not responsible for her subordinates’ misconduct—she never ordered inspecting officers to be armed, use threats, or retrieve data beyond the scope of the subpoena. Any reasonable official could believe

it was lawful to enforce a presumptively valid statute, especially when it provided an adequate warrant substitute and offers a precompliance review before executing warrantless searches.

1. Qualified immunity shields Cleopatra from liability because of the lack of clearly established Fourth Amendment law for closely regulated industries.

It was objectively reasonable for Cleopatra to order a statutorily authorized search of medical records from a health insurance company in light of the Fourth Amendment standard for closely regulated businesses. As the Board's Commissioner, Cleopatra had a responsibility to enforce the EMSA, a presumptively valid statute. R. at 4. Cleopatra authorized a subpoena to obtain relevant medical records from a health insurance company to investigate a claim of substandard medical care during an ongoing pandemic. R. at 4. There is no single precedent, much less a controlling case, that has found a Fourth Amendment violation under similar circumstances. There is no law that has put officials on notice that a warrantless search of a health insurance company under these circumstances violates the Fourth Amendment. This Court has not analyzed the constitutionality of warrantless searches of health insurance companies. Neither has any circuit court. Neither has any district court. Nor has this Court limited the closely regulated standard to the four industries recognized by this Court.<sup>2</sup> *See Patel*, 576 U.S. at 424. Indeed, courts across the country have continued to analyze whether industries are closely regulated post-

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<sup>2</sup> *See Colonade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (firearms dealing); *Biswell*, 406 U.S. at 316 (mining); *Dewey*, 452 U.S. at 594 (liquor sales); *Burger*, 482 U.S. at 691 (1987) (automobile junkyards).

*Patel*. See, e.g., *Free Speech Coal., Inc. v. AG United States*, 825 F.3d 149, 158 (3d Cir. 2016) (finding the pornography industry was not closely regulated); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 282 (6th Cir. 2018) (finding the precious metals dealing industry was closely regulated).

Not only is there no factually similar controlling precedent, there is no clear consensus among courts that have analyzed analogous industries. For instance, the Fifth Circuit recognized both insurance and pharmaceutical companies as closely regulated industries. See *United States v. Blocker*, 104 F.3d 720, 741 (5th Cir. 1997) (applying the closely regulated standard to insurance industries); *United States v. Schiffman*, 572 F.2d 1137, 1142 (5th Cir. 1978) (finding that the pharmaceutical industry is closely regulated). By contrast, the Fifth Circuit found that the medical profession was not closely regulated, though it stated that a reasonable official could have believed it to be. See *Zadeh v. Robinson*, 928 F.3d 457, 470 (5th Cir. 2019) (cert. denied). If anything, a reasonable official could interpret these cases and conclude that health insurers *are* closely regulated. The lack of factually similar binding precedent or clear trend among courts is a strong indicator that the law was not clearly established. General constitutional standards *can* show a law was clearly violated if the illegality of the conduct immediately follows from the rule. See *Wesby*, 138 S. Ct. at 589. The issue becomes whether the search of Caesar was clearly unconstitutional under the general standard for closely regulated industries set out in *Burger* and *Patel*. It was not.

There was no clear violation of the closely regulated industry standard under *Burger* and *Patel* here. This case presents novel factual circumstances. Health insurance is more regulated than motels, and even more regulated than automobile junkyards. *See Patel*, 576 U.S. at 424; *see also Burger*, 482 U.S. at 720. A reasonable official could conclude that health insurance is closely regulated. That health insurance is *not* closely regulated does not immediately follow the general standards of *Patel* and *Burger*.

The subpoena executed against Caesar did not clearly violate the requirements for a reasonable warrantless search of a closely regulated industry. The subpoena was issued to enforce a presumptively valid statute and complied with all statutory requirements. R. at 4. A reasonable official would not clearly know that following the letter of the EMSA was unconstitutional. Caesar knew or had reason to know it was subject to the EMSA's subpoena authority, or at least a reasonable official could conclude it was. The EMSA limits the scope of subpoenas only to information relevant to Miasmatic Syndrome treatment, limits the recipient of a subpoena only to entities which hold relevant information, and only allows searches to be conducted by Board officers. *See* PCL §§ 18.8.891 (a)-(c). Subpoenas may only be issued upon reasonable suspicion of wrongdoing or using a randomized, documented methodology. *See* PCL § 18.8.891(f). A reasonable official could conclude these limitations were sufficiently narrow in scope. A reasonable official could conclude that this subpoena provided an adequate warrant substitute—the rule for closely regulated industries is too general to put the constitutional issue beyond debate.

The warrantless administrative search of a closely regulated industry does not require an opportunity for precompliance review. It is objectively reasonable to believe health insurance is a closely regulated industry, and the circumstances of the search here satisfied the requirements of the closely regulated standard. It naturally follows that it is reasonable for officials to believe that an opportunity for precompliance review was not required in these circumstances. Even if it *was* required, a reasonable official could believe the opportunity to review the subpoena to the issuing eleven-member board was constitutionally sufficient.

2. Cleopatra is immune from liability because there is not clearly established law for what constitutes sufficient precompliance review before a neutral decisionmaker.

No law advised officials that a warrantless search authorized by a presumptively valid statute that explicitly offered recipients an opportunity for precompliance review before the issuing party violated the Fourth Amendment. What constitutes sufficient precompliance review is not clearly established. This Court expressly elected *not* to define the contours of the requirement. *See Patel*, 576 U.S. at 421 (reasoning that because the statute in question did not offer any opportunity for review whatsoever, there was no need to define the standard). And, while courts generally interpreted a neutral decisionmaker to mean a judge or judicial entity, at that time there was no precedent explicitly considering whether a non-judicial entity constitutes a neutral decision maker.

A reasonable official could consider that the EMSA provided a sufficient opportunity for precompliance review before a neutral decisionmaker. The EMSA

permits a subpoena recipient to petition the full Board for review of the subpoena without penalty for refusing to comply. *See* PCL § 18.8.891(e). Cleopatra, as Board Commissioner, unilaterally authorized the subpoena. R. at 4. The opportunity for review is before the full eleven-member board. *See* PCL § 18.8.891(e). It follows that review to the full Board acts as a check on Cleopatra's discretion and holds her accountable. *See Patel*, 567 U.S. at 423. A reasonable official enforcing a presumptively valid statute that provides an explicit opportunity for precompliance review before the Board could reasonably believe that the subpoena was constitutional.

The law governing a warrantless search of a health insurance company conducted pursuant to statute is not clearly established such that a reasonable official would know the search was unconstitutional. Cleopatra's conduct was objectively reasonable in light of clearly established law. This claim is barred by qualified immunity.

### CONCLUSION

This case highlights the need for officials to be able to respond to emerging threats to public health. Officials have a responsibility to protect the citizens they serve and restricting them with the looming fear of liability only paralyzes them in fulfilling their duties. A statutorily authorized subpoena issued to obtain records from a health insurance company does not violate a clearly established constitutional right. Cleopatra acted under the EMSA to authorize a warrantless search of a health insurance company as part of an investigation into allegations of dangerous

treatment during an ongoing pandemic. We urge this Court to affirm the Fourteenth Circuit's decision and hold that a warrantless search of a health insurance company, under these circumstances, does not violate a clearly established constitutional right.

Respectfully Submitted,

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## APPENDIX A

### Romulus Consolidated Law (RCL)

#### Chapter 18 – Health Care and Public Health

##### Subchapter 18.8 – Board of Health

##### § 18.8.001 – Definitions [Sections a-ff omitted]

gg) Hospital: A facility or institution engaged principally in providing services by or under the supervision of a physician.

##### § 18.8.100 – Responsibilities of the Board

1. a) The primary responsibility of the Board shall be the safeguarding of the Public Health, which shall be broadly construed to include the physical and mental wellbeing of the people of the State.
2. b) The Board shall especially focus on the control and elimination of contagious disease within the state.
3. c) The Board shall, in its discretion, take all actions as shall be necessary in support of these goals, within the powers delegated to it under the laws of the State of Romulus.

##### § 18.8.500 – Licensing of Hospitals

1. a) It shall be unlawful for any Hospital to conduct business within the State, without possessing an Operating License issued by the Board.
2. b) The Board shall issue an Operating License upon a majority vote of the Board, if the Board in its sole discretion determines that the operation of the Hospital shall be in the interest of the Public Health, according to such procedures and regulations as the Board may set.
3. c) Upon a finding a licensed Hospital's continued operation is no longer in the interest of the Public Health, the Board by a majority vote may take any or all of the following actions:
  1. 1) Instruct the Hospital to make certain changes, such that the Hospital's continued operation will be in the interest of the Public Health;
  2. 2) Require the Hospital to pay an appropriate and proportional monetary fine;
  3. 3) Suspend the Hospital's Operating License, until a date certain or until such date as

certain requirements are met; and

4. 4) Permanently revoke the Hospital's Operating License.

**§ 18.8.890 – Miasmic Syndrome Response**

1. a) The Board shall be responsible to take all reasonable actions within its authority to determine whether the level of service provided to Miasmic Syndrome patients at each licensed Hospital is in compliance with all relevant standards in the medical field.
2. b) If any Hospital is found to provide Miasmic Syndrome care which is not in compliance with all relevant standards in the medical field, the Board will consider this as evidence that the Hospital's operations are not in the interest of the Public Health.

**§ 18.8.891 – Emergency Subpoenas in relation to Miasmic Syndrome**

1. a) The Commissioner of the Board may authorize an administrative subpoena to any licensed Hospital, which may require the Hospital to:
  1. 1) Admit personnel of the Board onto their premises to inspect for evidence that the facility is providing substandard care for Miasmic Syndrome; and
  2. 2) Provide such records or documents to the Board as the Board may in its discretion require in order to determine if the Hospital is providing substandard care for Miasmic Syndrome.
2. b) The Commissioner of the Board may authorize an administrative subpoena to any other person or entity within the State, which may require that person to provide any records or documents to the Board as the Board may in its discretion require in order to determine if a licensed Hospital is providing substandard care for Miasmic Syndrome.
3. c) A subpoena issued under this section shall be no broader than is reasonably required to determine whether a Hospital is providing substandard care for Miasmic Syndrome.
4. d) If an entity fails to comply with a subpoena issued under this section:
  1. 1) If the entity is a licensed Hospital, the Board may treat this as evidence that the Hospital is providing substandard care for Miasmic Syndrome, and further may treat the act of refusal itself as evidence that the Hospital is providing care contrary to the Public Health; and
  2. 2) If the entity is not a licensed Hospital, the Board may seek a court order to enforce compliance with the subpoena.
5. e) Upon petition by an entity which is the target of a subpoena under this section, the full Board shall review the subpoena and may amend or quash it, if the Board agrees to do so by majority vote. No entity that so petitions will be penalized for its refusal, during the pendency of its petition, to comply with a subpoena under this section. During the pendency of any such petition, the entity will preserve all evidence as is sought by the subpoena. Failure to preserve such evidence may constitute Obstruction of Justice.

6. f) The Board shall only issue a subpoena under this section:
  1. 1) Upon reasonable suspicion that the Hospital about which information is sought may be providing substandard care for Miasmic Syndrome; or
  2. 2) To a licensed Hospital at random, as part of a documented and fair methodology for conducting random inspections.

**Chapter 30: Criminal Law**

**Subchapter 30.50: Interference with Public Administration § 30.50.120 – Obstruction of Investigation**

It shall be a misdemeanor to obstruct or impede any duly authorized agent of the State of Romulus in that agent's conduct of a search or investigation authorized by law.

## APPENDIX B

### Subpoena issued by Livia Cleopatra

State of Romulus Department of Health Livia Cleopatra, Commissioner  
**SUBPOENA FOR INSPECTION AND PRODCUTION OF DOCUMENTS SPECIAL  
PUBLIC HEALTH NEED - EMSA**

To CAESAR HEALTH PLAN (THE "ORGANIAZATION") AND ITS PERSONNEL,

Under the authority granted by the Emergency Miasmic Syndrome Act (PCL § 18.8.891), you are hereby COMMANDED to admit to the Organization's premises the personnel of the Romulus Board of Health, for the purposes of conducting an inspection and search for information relevant to potential negligent or substandard care for Miasmic Syndrome.

You are further COMMANDED to product to such personnel all records related to medical care at Julius Medical Center, which are:

1. 1) Related to the diagnosis and/or treatment of Miasmic Syndrome, or
2. 2) Related to patients who are suspected of carrying Miasmic Syndrome

Records sought under this subpoena include all insurance claims and medical records in

the possession of the Organization which are related to such services and/or patient population, and which are dated on or after May 1, 2019.

Compliance with this subpoena will take place at 8 AM on March 19, 2020. Failure to comply by the Organization, through its personnel, may result in such legal actions by the Board of Health as are necessary to protect the public health. The Board is empowered to impose monetary penalties, and in appropriate situations to revoke a facility's operating license in the event of noncompliance with an EMSA subpoena. Illegally interfering with the execution of this legally-authorized collection of information is a criminal offence.

. Livia Cleopatra . Livia Cleopatra, Commissioner March 13, 2020

## **APPENDIX C**

### **18 U.S.C § 1964. Civil Remedies**

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [18 USCS § 1962]. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

### **42 U.S.C. § 1983. Civil Action for Deprivation of Rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## **APPENDIX D**

### **U.S. CONST. amend. IV. Unreasonable Searches and Seizures**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## APPENDIX E

**45 C.F.R. § 164.512(b)(1)(i). Uses and disclosures for which an authorization or opportunity to agree or object is not required.**

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(b) Standard: Uses and disclosures for public health activities.

(1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

(ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect;

(iii) A person subject to the jurisdiction of the Food and Drug Administration (FDA) with respect to an FDA-regulated product or activity for which that person has responsibility, for the purpose of activities related to the quality, safety or effectiveness of such FDA-regulated product or activity. Such purposes include:

(A) To collect or report adverse events (or similar activities with respect to food or dietary supplements), product defects or problems (including problems with the use or labeling of a product), or biological product deviations;

(B) To track FDA-regulated products;

(C) To enable product recalls, repairs, or replacement, or lookback (including locating and notifying individuals who have received products that have been recalled, withdrawn, or are the subject of lookback); or

(D) To conduct post marketing surveillance;

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation; or

(v) An employer, about an individual who is a member of the workforce of the employer, if:

- (A) The covered entity is a covered health care provider who provides health care to the individual at the request of the employer:
  - (1) To conduct an evaluation relating to medical surveillance of the workplace; or
  - (2) To evaluate whether the individual has a work-related illness or injury;
- (B) The protected health information that is disclosed consists of findings concerning a work-related illness or injury or a workplace-related medical surveillance;
- (C) The employer needs such findings in order to comply with its obligations, under 29 CFR parts 1904 through 1928, 30 CFR parts 50 through 90, or under state law having a similar purpose, to record such illness or injury or to carry out responsibilities for workplace medical surveillance; and
- (D) The covered health care provider provides written notice to the individual that protected health information relating to the medical surveillance of the workplace and work-related illnesses and injuries is disclosed to the employer:
  - (1) By giving a copy of the notice to the individual at the time the health care is provided; or
  - (2) If the health care is provided on the work site of the employer, by posting the notice in a prominent place at the location where the health care is provided.
- (vi) A school, about an individual who is a student or prospective student of the school, if:
  - (A) The protected health information that is disclosed is limited to proof of immunization;
  - (B) The school is required by State or other law to have such proof of immunization prior to admitting the individual; and
  - (C) The covered entity obtains and documents the agreement to the disclosure from either:
    - (1) A parent, guardian, or other person acting in loco parentis of the individual, if the individual is an unemancipated minor; or
    - (2) The individual, if the individual is an adult or emancipated minor.
- (2) Permitted uses. If the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

## APPENDIX F

### 45 CFR § 164.512(e). Uses and disclosures for which an authorization or opportunity to agree or object is not required.

#### (e) Standard: Disclosures for judicial and administrative proceedings -

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

- (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.
- (iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
- (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
  - (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
- (v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
- (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
  - (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.
- (vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.
- (2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.